TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 327.

KINDRED BAUGHAM, ADMINISTRATOR OF RICHARD T. BAUGHAM, DECEASED, PLAINTIFF IN ERROR,

vs.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JANUARY 18, 1915.

(24,518)

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1 Copy.

Supreme Court of Appeals of the State of Virginia.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased, Plaintiff,

vs.

NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, a Corporation, Defendant.

Assignments of Error.

Now comes the above plaintiff, Kindred Baugham, Administrator of Richard T. Baugham, deceased, and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments of error:

1. The Supreme Court of Appeals of the state of Virginia erred in refusing, by its judgment rendered in this case on the 4th day of September, 1914, to award to the plaintiff a writ of error and supersedeas from the said Supreme Court of Appeals of the state of Virginia to the judgment of the circuit court of the county of Norfolk, rendered against the said plaintiff, and in favor of the said defendant, on the 4th day of December, 1913, and in thereby affirming the said judgment of the circuit court of the county of Norfolk.

The said plaintiff, as will appear from the transcript of the record and proceedings in said case, asserted the right to recover damages of the defendant in this case under and by virtue of the provisions of the act of Congress of the United States, approved on the 22d day of April, 1908, and known as the Federal Employers' Liability Act (35 U. S. Stat. at L. 65, c. 149). The said plaintiff, therefore, claimed in this case rights, privileges and immunities under the law of the United States, which were denied him by the said decision and judgment of the said Supreme Court of Appeals of the state of Virginia.

The said errors in the said judgment of the said Supreme Court of Appeals of the state of Virginia are more particularly set forth as follows:

2 1-*a*. The said Supreme Court of Appeals erred in affirming the said judgment of the circuit court of the county of Norfolk, by which the said circuit court sustained the defendant's demurrer to the evidence and rendered judgment in favor of the said defendant, for the following reasons:

(*a*) The fatal injury to the decedent, Richard T. Baugham, resulted in whole or in part from the negligence of the officers, agents and employes of the defendant, in failing to give to the said

decedent adequate instruction and warning with respect to the dangers incident to the service in which he was engaged, within the purview of the first section of the said act of Congress;

(*b*) The said fatal injury to the decedent resulted also in whole or in part from a defect or insufficiency, due to the negligence of the defendant, in its tracks, roadbed, boat or barge, and equipment, within the purview of the first section of said act of Congress.

1-*b*. The said Supreme Court of Appeals erred in holding and deciding by its said judgment, rendered on the 4th day of September, 1914, that the said judgment of the circuit court of the county of Norfolk should not be reversed, and a judgment rendered by the said Supreme Court of Appeals in favor of the plaintiff for the sum of $10,000.00., the amount of damages awarded him by the jury, with interest thereon from the 4th day of December, 1913, and for costs.

It was admitted by the defendant as a fact in this case on the trial thereof in the said circuit court of the county of Norfolk that the defendant at the time of the injury to the decedent was a common carrier by railroad, engaging in interstate commerce, and that the said defendant was a person employed by said defendant in such commerce; and the plaintiff submits that the evidence sustained his right to recover damages of the defendant on either, and on both, of the grounds of negligence charged in the declaration, to-wit: (1) that the said injury resulted in whole or in part from the negligence of the officers, agents and employes of the defendant, in failing to give to the decedent, Richard T. Baugham, adequate instruction and warning with respect to the dangers of the service in which he was engaged; and (2) that the said injury resulted in whole or in part from a defect or insufficiency,
3 due to the negligence of the defendant, in its tracks, roadbed, boat or barge, and equipment.

1-*c*. The said Supreme Court of Appeals erred in holding and deciding by its said judgment rendered on the 4th day of September, 1914, that the judgment of the said circuit court of the county of Norfolk properly sustained the defendant's demurrer to the evidence, and in thereby holding, upon the said demurrer to the evidence, as the said circuit court erroneously held upon the said demurrer to the evidence, that the death of the decedent, Richard T. Baugham, did not result in whole or in part (1) from the negligence of any of the officers, agents or employes of the defendant in failing adequately to instruct or warn the said decedent as to the dangers incident to the service, or (2) by reason of any defect or insufficiency, due to the negligence of the said defendant, in its tracks, roadbed, boat or barge, or equipment, and accordingly that the said defendant was not liable in damages to the plaintiff under the first section of the said act of Congress.

1-*d*. The said Supreme Court of Appeals erred in refusing to award the plaintiff a writ of error and supersedeas to the said judgment of the said circuit court of the county of Norfolk, and in thereby affirming the rulings of the said circuit court in the admission and exclusion of evidence in the following particulars,

which the plaintiff assigns also as errors in the rulings of the said circuit court during the progress of the trial:

(1) in permitting the defendant to introduce as evidence the testimony of its witness, Richardson, set out in plaintiff's bill of exceptions No. 1;

(2) in permitting the defendant to introduce as evidence the testimony of said witness set out in plaintiff's bill of exceptions No. 2;

(3) in refusing to permit counsel for the plaintiff to propound to defendant's witness, H. L. Boyland, the question set out in plaintiff's bill of exceptions No. 3;

(4) in refusing to permit plaintiff's counsel to propound to said witness the questions set out in plaintiff's bill of exceptions No. 4; and

(5) in refusing to permit the plaintiff's counsel to pro-
4 pound to said witness the question set forth in plaintiff's bill of exceptions No. 5.

2. The plaintiff avers that for the reasons, and in the particulars, herein set forth the said judgment of the circuit court of the county of Norfolk is erroneous, and he prays that, so far as may be necessary under the practice of the said Supreme Court of the United States for him to assign errors in the said judgment of the circuit court, the foregoing assignments of error in the rulings and judgment of the said Supreme Court of Appeals, may be taken and treated as assignments of error also in the rulings and judgment of the said circuit court.

For which errors, the plaintiff, Kindred Baugham, Administrator of Richard T. Baugham, deceased, prays,

1. That the said judgment of the said Supreme Court of Appeals of the state of Virginia, rendered on the 4th day of September, 1914, as aforesaid, may be reviewed, reversed and annulled;

2. That the judgment of the said circuit court of the county of Norfolk, rendered as aforesaid on the 4th day of December, 1913, in favor of the defendant, be also reviewed, reversed and annulled;

3. That a judgment may be rendered in favor of the plaintiff for the sum of $10,000.00., the damages awarded him by the jury, with interest thereon from the said 4th day of December, 1913, and for costs; and that all such other and further relief as may be proper in the premises may be granted.

EDWARD P. BUFORD,
Attorney for the Plaintiff, Kindred Baugham, Administrator of Richard T. Baugham, Deceased.

5 [Endorsed:] Kindred Baugham, Administrator, etc. vs. New York, Philadelphia and Norfolk Railroad Company. Assignments of error. Received and filed December 22nd. H. Stewart Jones clerk. Buford, Lewis & Peterson, attorneys at law, Lawrenceville, Virginia.

6 Supreme Court of Appeals of the State of Virginia.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased, Plaintiff,

vs.

NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, a Corporation, Defendant.

Petition for Writ of Error.

To the Honorable James Keith, President of the Supreme Court of Appeals of the State of Virginia:

Considering himself aggrieved by the final judgment of the Supreme Court of Appeals of the state of Virginia, in rendering judgment against him in the above entitled case, the plaintiff, Kindred Baugham, Administrator of Richard T. Baugham, deceased, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States; the said Supreme Court of Appeals of the state of Virginia being the highest court of law or equity in said state in which a judgment can be had in said case. Assignments of error herewith.

EDWARD P. BUFORD,
Attorney for the Plaintiff, Kindred Baugham, Administrator of Richard T. Baugham, Deceased.

STATE OF VIRGINIA,
Supreme Court of Appeals, ss:

Let the writ issue upon execution of a bond by the plaintiff, Kindred Baugham, Administrator of Richard T. Baugham, deceased, to the defendant, the New York, Philadelphia and Norfolk Railroad Company, a corporation, in the sum of $300.00; said bond when approved to act as a supersedeas.

Dated, December 22nd 1914.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

7 [Endorsed:] Kindred Baugham, Administrator, etc. vs. New York, Philadelphia and Norfolk Railroad Company. Petition for writ of error and Order granting writ. Buford, Lewis & Peterson, Attorneys at Law, Lawrenceville, Virginia.

8 Copy.

Supreme Court of the United States.

No. —.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased, Plaintiff,

vs.

NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, a Corporation, Defendant.

Bond.

Know all men by these presents, That we, Kindred Baugham, Administrator of Richard T. Baugham, deceased, as principal, and W. T. Sledge and W. A. Trotter, as sureties, are held and firmly bound unto the New York, Philadelphia and Norfolk Railroad Company, a corporation, in the sum of Three hundred dollars ($300.00), to be paid to the said New York, Philadelphia and Norfolk Railroad Company, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 21st day of December, 1914.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of Appeals of the state of Virginia.

Now, therefore, The condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

KINDRED BAUGHAM. [SEAL.]
Administrator of Richard T. Baugham, Deceased.
W. T. SLEDGE. [SEAL.]
W. A. TROTTER. [SEAL.]

STATE OF VIRGINIA,
County of Brunswick, ss:

9 W. T. Sledge and W. A. Trotter, being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the state of Virginia, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Three hundred dollars ($300.00), over and above all debts, liabilities and exemptions.

W. T. SLEDGE.
W. A. TROTTER.

Subscribed and sworn to before me this 21st day of December, 1914.

[Seal J. R. Owens, Notary Public, Brunswick Co., Va.]

J. R. OWENS,
Notary Public.

(My Commission expires December 11, 1915.)

The above bond is approved.

JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of Appeals of Virginia on December 22, 1914, and the following endorsement made thereon. Received and filed December 22, 1914.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

10 [Endorsed:] Supreme Court of the United States. No. —. Kindred Baugham, Administrator of Richard T. Baugham, deceased, vs. New York, Philadelphia and Norfolk Railroad Company. Bond. Buford, Lewis & Peterson, Attorneys at Law, Lawrenceville, Virginia.

11 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Because in the record and proceeding, as also in the rendition of the judgment, of a plea which is in the said supreme court of appeals of the state of Virginia, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Kindred Baugham, Administrator of Richard T. Baugham, deceased, and New York, Philadelphia and Norfolk Railroad Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Kindred Baugham, Administrator of Richard T. Baugham, de-

ceased, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at
12 Washington on the 18th day of January, 1915, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 23rd day of December, in the year of our Lord 1914.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the United States District Court for the Eastern District of Virginia.

Allowed by
JAMES KEITH,
President of the Supreme Court of Appeals of the State of Virginia.

The original of the foregoing writ of error was lodged with the clerk of the Supreme Court of Appeals of Virginia on December 23rd, 1914, and also at the same time and place a copy thereof for the New York, Philadelphia and Norfolk Railroad Company. The following endorsement was made upon the said original writ and upon the copy: Writ of error received and filed December 23, 1914.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Legal service of the foregoing writ of error is hereby accepted.
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY,
By THOMAS H. WILLCOX, *Its Attorney.*

December 26, 1914.

13 [Endorsed:] Received and filed December 23, 1914. H. Stewart Jones, Clerk Supreme Court of Appeals of Virginia.

14 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the New York, Philadelphia and Norfolk Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error

filed in the office of the clerk of the Supreme Court of Appeals, of the State of Virginia, wherein Kindred Baugham, Administrator of Richard T. Baugham, deceased, is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the President of the Supreme Court of Appeals of the State of Virginia, this the 23rd day of December, 1914.

JAMES KEITH,
President Supreme Court of Appeals of the State of Virginia.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Attest:
H. STEWART JONES,
Clerk of the Supreme Court of Appeals of the State of Virginia.

Legal service of the foregoing citation is hereby accepted.
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY,
By THOMAS H. WILLCOX, *Its Attorney.*

December 26, 1914.

15–85 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Appeals of Virginia, in the City of Richmond, this 7th day of January, 1915.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

Costs of transcript, $63.73, paid by E. P. Buford.
H. STEWART JONES,
Clerk of the Supreme Court of Appeals of Virginia.

The attorneys of record in the case are as follows:
E. P. Buford, Lawrenceville, Virginia, for plaintiff in error.
Thos. H. Willcox, Norfolk, Virginia, for defendant in error.

86 VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals, at the Library Building, in the City of Richmond, on Thursday, the 10th Day of September, 1914:

The following copy of an order of this court, entered at its place of Session at Staunton, was this day received by the Clerk here, to-wit:

"VIRGINIA:

In the Supreme Court of Appeals, Held at the Courthouse Thereof, in the City of Staunton, on Friday, the 4th Day of September, 1914.

The petition of Kindred Baugham, Administrator of Richard P. Baugham, deceased, for a writ of error and supersedeas to a judgment of the Circuit Court of Norfolk County, pronounced on the 4th day of December, 1913, in the cause therein pending of Kindred Baugham, Admr. vs. New York, Philadelphia & Norfolk Railroad Company, having been heretofore refused by the Judges in vacation, the petitioner under section 3466 of the Code of Virginia, tendered again in open court his petition for said writ of error and supersedeas, and the court having maturely considered the petition aforesaid, and the transcript of the record of the said judgment having been seen and inspected, the court being of the opinion that the said judgment is plainly right, doth refuse the said writ of error and supersedeas asked for, which refusal doth in effect affirm the judgment of the said circuit court of Norfolk county.

Which is ordered to be certified to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said Circuit Court of Norfolk County.

A copy, Teste:

H. H. WAYT, *Clerk.*"

Teste:

H. STEWART JONES, *C. C.*

A copy.
Teste:

H. STEWART JONES, *C. C.*

87 VIRGINIA:

Pleas Before the Circuit Court of Norfolk County, at the Courthouse of said County, on the 31st Day of January, 1914.

Be it remembered, that heretofore, to wit:

At rules held in the Clerk's Office of said Court on third Monday in August, 1913, came the plaintiff, Kindred Baugham, Administrator of Richard T. Baugham, and filed his declaration in the suit then pending against the New York, Philadelphia and Norfolk Railroad Company, in the words and figures following, to-wit:

VIRGINIA:

In the Circuit Court of Norfolk County.

KINDRED BAUGHAM, Administrator of Richard T. Baugham,
versus
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY.

Declaration.

Kindred Baugham, Administrator of the estate of Richard T. Baugham, deceased, plaintiff, complains of the New York, Philadelphia and Norfolk Railroad Company, a corporation, defendant, of a plea of trespass on the case for this, to-wit:

That before and at the time of committing the wrongs and grievances hereinafter mentioned, the said defendant had been and was a corporation, operating a railroad, a part whereof extended
88 from the terminals thereof in the town of Cape Charles, in the County of Northampton, in the State of Virginia, northward through the State of Virginia and thence forward into the State of Maryland, and elsewhere; a part whereof, to wit; certain terminals, to-wit: certain wharves, to-wit: certain docks, to-wit: a certain railroad yard, to-wit: certain tracks were situated at Port Norfolk, in the county of Norfolk, in the State of Virginia; a part whereof, to-wit: certain terminals, to-wit: certain tracks, to-wit; certain wharves, to-wit:—certain docks were situated in the City of Norfolk, in the State of Virginia, and other parts whereof, to-wit; certain terminals, to-wit: certain railroad tracks, to-wit: certain wharves were situated elsewhere; upon, along and over which railroad the said defendant hauled and operated trains of cars by means of locomotive engines, propelled by steam, for the transportation of passengers and freight in its business which it then and there conducted and carried on as a common carrier of passengers and freight; and in conjunction and in connection with the said railroad as a part of the equipment, facilities and apparatus thereof, the said defendant also maintained and operated a certain floating equipment, consisting of certain boats, to-wit: certain barges, to-wit: certain tug boats, to-wit: certain steamboats, and particularly a certain barge sometimes designated as barge number 14,
89 which said barges and which said barge number 14 in particular, were propelled by the said tug boats and steamboats, and plied between certain places, to-wit; between said Port Norfolk and the said City of Norfolk, in the state of Virginia, to-wit: between the said Port Norfolk and the said town of Cape Charles, in the said state of Virginia, to-wit: between the said city of Norfolk and the said town of Cape Charles, in the said state of Virginia, as well as between certain other places; by means of which said barges and of the said barge number 14 in particular, towed and propelled as aforesaid by the said tugboats and steam boats, plying as aforesaid between the places aforesaid, the said defendant conveyed and transported freight and box cars and trains of freight and box

cars, in pursuance of its business as a common carrier as aforesaid; and the said defendant, for the purpose of carrying on and conducting its business aforesaid, hired and had in its service divers agents, employes and servants, to-wit: locomotive engineers, to-wit: brakemen, to-wit: masters or captains of said barges, tug boats and steamboats, to-wit: yard masters engaged in the physical operation of its trains, cars, engines, barges, tugboats and steamboats, and in service requiring their presence upon its said trains, cars, engines, barges, tugboats and steamboats.

90 And the said defendant, as such common carrier of passengers and freight, was, at the time of committing the said wrongs and grievances, engaged in certain commerce, commonly called interstate commerce, to-wit: certain commerce between certain of the several states, to-wit: certain commerce between certain of the several territories, to-wit: certain commerce between certain of the states and territories, to-wit: certain commerce between the District of Columbia and certain of the states, to-wit: certain commerce between the District of Columbia and certain of the territories, to-wit: certain commerce between the District of Columbia and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the states and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the territories and a certain foreign nation or certain foreign nations, within the meaning, purview and intendment of that certain act of Congress of the United States of America, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases," which was approved on April 22, 1908.

And the said defendant being the proprietor and operator of the said railroad and of the said boats, barges, tugboats and steamboats, heretofore, to-wit: on December 30, 1912, and for a certain

91 space of time theretofore, to-wit: the space of one day theretofore, the said plaintiff's intestate, who was then and there an infant of a certain age, to-wit: of the age of eighteen (18) years, and without previous experience in, or knowledge of the dangers, risks and perils of the service and employment in which he was then and there engaged, as hereinafter set forth, by the said defendant, at the special instance and request of the said defendant, had become and was a servant and employe of the said defendant, engaged and employed by the said defendant, in the capacity, and for the purpose of performing the duties, of a brakeman, in a certain yard of the said defendant, to-wit: the yard aforesaid, situate at Port Norfolk, in the said County of Norfolk and state of Virginia, and as a member of a certain train crew, to-wit: that certain train crew consisting of certain persons, to-wit: a certain engineer, to-wit: a certain fireman, to-wit: a certain conductor, to-wit: a certain brakeman, to-wit: the said plaintiff's intestate, was then and there engaged by means of a certain one of the locomotive engines of the said defendant, then and there operated by the said defendant, by and through its said servants and agents in that behalf, to-wit: the said train crew, comprising the persons aforesaid, in transferring from the said cer-

tain tracks of the said defendant in the yard last aforesaid,
92 to a certain boat or barge of the said defendant, to-wit: barge number 14, certain freight and box cars, which then and there by means of the said barge and a certain one of the said tugboats or steamboats, were thence to be towed and transported by the said defendant, by its servants and agents in that behalf, as a common carrier aforesaid, then and there engaged in such commerce.

And the said barge number 14, to which the said cars were then and there being transferred as aforesaid, and which was then and there moored and made fast at one end thereof to a certain one of the said wharves or docks of the said defendant, in the said yard of the said defendant, situated at Port Norfolk, in the said county of Norfolk and state of Virginia, as aforesaid, contained upon the deck thereof four certain railroad tracks extending from end to end of the said barge and parallel with one another, except towards each extremity thereof, designed for the reception of freight and box cars in the course of the transportation thereof as aforesaid, of which said tracks two were situated on the one side of the central or medial line of said barge and converged at each end of said barge to a single track, affording a common means of communication for the two said tracks with the tracks of the said yard; and two were situated on the other side of said line and converged at each end of said
93 barge to a single track, likewise affording a common means of communication for the two last mentioned tracks with the tracks of said yard; and of the said four railroad tracks situated upon said barge as aforesaid, those two certain railroad tracks next to the said central or medial line of said barge, the one on the one side thereof and the other on the other side thereof, throughout the space where they ran parallel to each other, were distant from each other by a certain interval, to-wit: the interval of five and one-half (5½) feet, and were, at or near the ends of said barge, where, by a gradual curve they attained their greatest degree of divergence and joined the said single tracks communicating with the tracks of said yard as aforesaid, distant from each other by a certain interval, to-wit: the interval of ten (10) feet; and by reason of the arrangement, situation and construction of the two railroad tracks last aforesaid, to-wit: the said track situate on one side of, and next to, the said central or medial line of the said barge, and the said other track situate on the other side of, and next to, the said line, a box car or cars proceeding from the said dock or wharf upon the said barge would gradually advance from a position at the end of said barge where the two said tracks last aforesaid were distant from each other as aforesaid by a certain interval, to-wit: the interval of ten
94 (10) feet, to a certain other position, where the two said tracks last aforesaid were parallel and were distant from each other as aforesaid by a certain interval, to-wit: the interval of five and one-half (5½) feet, in the former of which said positions the eaves of the roof of the said box car or cars advancing as aforesaid on the one track would be distant from the eaves of the roof or roofs of a box car or cars standing on the other said track last aforesaid, and opposite the said car or cars advancing as aforesaid, by a certain

interval, to-wit: the interval of six (6) feet, and in the latter of which said positions the eaves of the roof of said car or cars so advancing would be distant from the eaves of the roof or roofs of a box car or cars standing on the other of the two said tracks last aforesaid, and opposite the said cars thus advancing, by a certain interval, to-wit: the interval of six (6) inches; and by reason of the premises, the close proximity aforesaid of the eaves of the roof or roofs of the said car or cars moving upon one of the said tracks when in the position last aforesaid, to the eaves of the roof or roofs of the said car or cars aforesaid, standing upon the other of the two tracks last aforesaid, would inflict serious and deadly injury upon the person of the servants, employes and agents of the said defendant,
95 and particularly upon the person of the plaintiff's intestate, who, in the course of their service as the servants and employes of the said defendant, should be caught or confined between the eaves of the roof or roofs of the said car or cars moving upon the one of the said tracks last aforesaid and the eaves of the roof or roofs of the car or cars aforesaid standing upon the other of the two tracks last aforesaid; of all which said premises the said defendant then and there had knowledge, or ought, in the exercise of ordinary care, then and there to have had knowledge; and the plaintiff's said intestate as said brakeman aforesaid, was, at the time of suffering the injury hereinafter mentioned, in obedience to the rules, orders and requirements of the said defendant, and by virtue of his employment as such brakeman, engaged in the physical operation of the trains and cars of the said defendant, and in the service of the said defendant requiring his presence on its trains, cars and barges, to-wit: on the said cars and on the said barge number 14, which said cars were then and there being transferred as aforesaid, and was then and there at the time of suffering the said injury, a person employed by the said defendant in such commerce, to-wit: in the interstate commerce aforesaid, within the meaning, purview and intendment of the Act of Congress aforesaid; and the said plain-
96 tiff's intestate was entitled to the benefit of the provisions of the said act of Congress.

And the said plaintiff avers that in the premises it became and was the duty of the said defendant, by and through its proper servant or agent, or its proper servants or agents in that behalf, before requiring the said plaintiff's intestate to perform the duty and service of brakeman as aforesaid, on the said train and cars, then and there being transferred from the said wharf or dock in the said yard to the said barge, and then and there moving upon the said barge, properly and adequately in the premises to instruct the plaintiff's said intestate, who was then and there wholly without experience in, or knowledge of the said service or duty which he was then and there performing as brakeman on the said train and cars, as aforesaid, then and there moving upon the said barge number 14 as aforesaid, and wholly ignorant of, and inexpert in, the dangers, difficulties and perils attending upon his said service and duty arising out of the peculiar arrangement, situation and construction of the said railroad tracks upon the said barge as aforesaid, to-wit: the said railroad track

situate on one side of, and next to, the said central or medial line of said barge, and said other track situate on the other side of, and next to, the said line, and to admonish and warn him of the said
97 difficulties, dangers and perils attending upon his said service and duty in the capacity of brakeman aforesaid, engaged as a member of the said train crew in transferring said trains and cars from the said wharf or dock to the said barge number 14, and arising out of the said peculiar arrangement, situation and construction of the said tracks upon the said barge, and the operation of transferring the said trains and cars from the tracks of the said yard to the tracks of the said barge, and of the proper means, method and manner of performing his said duty and service in the premises, in order that with reasonable safety in the premises hereinabove and hereinafter stated, he might perform his duty as brakeman upon said trains and cars as aforesaid.

Yet, the said defendant, not regarding its duty in that behalf, carelessly, negligently and wrongfully wholly failed and omitted to perform the same; and, on a certain day, to-wit: on the day and year last aforesaid, at a certain hour of the said day, to-wit: at the hour of 8:30 a. m., at a certain place at the said Port Norfolk, in the county of Norfolk and state of Virginia aforesaid, to-wit: on the said barge number 14, then and there moored and made fast to the said dock or wharf of the said defendant in the said yard of
98 the said defendant at Port Norfolk, in the said county and state, and did not, before requiring, directing and causing the plaintiff's said intestate to perform the duty and service of brakeman aforesaid on said trains and cars of the said defendant, then and there being transferred from the tracks in said yard to the tracks of said barge number 14, and then and there moving upon said barge, by and through its proper servant and agent, or proper servants and agents in that behalf, properly and adequately in the premises instruct him and admonish and warn him of the said dangers, difficulties and perils attending his said service and duty in the capacity of brakeman as aforesaid, engaged as a member of the said train crew in transferring said trains and cars from the said wharf or dock to the said barge number 14, and arising as aforesaid out of the said peculiar arrangement, situation and construction of the said railroad tracks last aforesaid upon the said barge, and operation of transferring the said trains and cars from the said wharf or dock to the said barge number 14, and of the proper means, method and manner of performing his said duty and service, in order that with reasonable safety in the premises hereinabove and hereinafter set forth, he might perform his said duty and service, so that by means of the premises the said plaintiff's intestate, while in the performance
99 of his duty and services as brakeman at the time and place last aforesaid, upon the said trains and cars then and there being transferred from the said wharf or dock to the said barge number 14, and in the act of ascending a certain one of the said cars then and there proceeding and moving upon said barge upon a certain one of the said railroad tracks, situate on one side of the said central line of the said barge, and next thereto, was caught and confined

between the eaves of the roof of the car which he was ascending as aforesaid, and the eaves of the roof or roofs of the car or cars standing upon the said railroad track situate on the other side of the said central line and next thereto, and by means of the premises the said plaintiff's intestate was then and there mangled, crushed and wounded, so that his ribs were broken, his lungs, his arm, to-wit: his left arm, and his shoulder were crushed, and great, serious and fatal bodily and physical injuries the plaintiff's said intestate then and there sustained, so that in consequence of the injuries aforesaid, on a certain day, to-wit: on the 31st day of December, 1912, the said plaintiff's intestate languished and died.

And by reason of the said premises, the said plaintiff says that he has cause of action against the said defendant, and has suffered
100 damage to the amount of Fifty Thousand Dollars ($50,000.00).

And for this, also, to-wit: that heretofore, to-wit: at the time of committing the wrongs and grievances hereinafter mentioned, the said defendant had been and was a corporation, operating a railroad, a part whereof extended from the terminals thereof in the town of Cape Charles, in the county of Northampton in the state of Virginia, northward through the state of Virginia, and thence forward into the state of Maryland, and elsewhere; a part whereof, to-wit: certain terminals, to-wit: certain wharves, to-wit: certain docks, to-wit: a certain railroad yard, to-wit: certain tracks were situated at Port Norfolk, in the county of Norfolk, in the state of Virginia; a part whereof, to-wit: certain terminals, to-wit: certain tracks, to-wit: certain wharves, to-wit: certain docks were situated in the city of Norfolk, in the state of Virginia, and other parts whereof, to-wit: certain terminals, to-wit: certain railroad tracks, to-wit: certain wharves were situated elsewhere; upon, along and over which railroad the said defendant hauled and operated trains of cars by means of locomotive engines propelled by steam, for the transportation of passengers and freight in its business which it then and there conducted and carried on as a common carrier of passengers and freight; and in conjunc-
101 tion and in connection with the said railroad as a part of the equipment, facilities and apparatus thereof, the said defendant also maintained and operated a certain floating equipment, consisting of certain boats, to-wit: certain barges, to-wit: certain tug boats, to-wit: certain steamboats, and particularly a certain barge sometimes designated as barge number 14, which said barges, and which said barge number 14 in particular, were propelled by the said tug boats and steamboats, and plied between certain places, to-wit: between the said Port Norfolk and the said city of Norfolk, in the state of Virginia, to-wit: between the said Port Norfolk and the said town of Cape Charles, in the said state of Virginia, to-wit: between the said city of Norfolk and the said town of Cape Charles, in the said state of Virginia, as well as between certain other places; by means of which said barges and of the said barge number 14 in particular, towed and propelled as aforesaid by the said tug boats and steamboats, plying as aforesaid between the places aforesaid, the said defendant conveyed and transported freight and box cars and trains

of freight and box cars, in pursuance of its business as a common carrier as aforesaid; and the said defendant, for the purpose of carrying on and conducting its business aforesaid, hired and had in its service divers agents, employes and servants, towit: locomotive engineers, to-wit: barkemen, to wit: masters or captains of said
102 barges, tug boats and steamboats, to-wit: yard masters, engaged in the physical operation of its trains, cars, engines, barges, tugboats and steamboats, and in service requiring their presence upon its said trains, cars, engines, barges, tugboats and steamboats.

And the said defendant, as such common carrier of passengers and freight, was, at the time of commit-ing the said wrongs and grievances, engaged in certain commerce, commonaly called interstate commerce, to-wit: certain commerce between certain of the several states, to-wit: certain commerce between certain of the several territories, to-wit: certain commerce between certain of the states and territories, to-wit: certain commerce between the District of Columbia and certain of the states, to-wit: certain commerce between the District of Columbia and certain of the territories, to-wit: certain commerce between the District of Columbia and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the states and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the territories and a certain foreign nation or certain foreign nations, within the meaning, purview and intendment of that certain act of Congress of the United States of America, entitled "An Act Relating to the Liability
103 of Common Carriers by Railroad to their Employes in Certain Cases," which was approved on April 22, 1908.

And the said defendant being the proprietor and operator of the said railroad and of the said boats, barges, tugboats and steamboats, heretofore, to-wit: on December 30, 1912, and for a certain space of time theretofore, to-wit: the space of one day theretofore, the said plaintiff's intestate, who was then and there an infant of a certain age, to-wit: of the age of eighteen (18) years, and without previous experience in, or knowledge of the dangers, risks and perils of the service and employment in which he was then and there engaged, as hereinafter set forth, by the said defendant, at the special instance and request of the said defendant, had become and was a servant and employe of the said defendant, engaged and employed by the said defendant in the capacity, and for the purpose of performing the duties, of a brakeman, in a certain yard of the said defendant, to-wit: the yard aforesaid, situate at Port Norfolk, in the said county of Norfolk and state of Virginia, and as a member of a certain train crew to-wit: that certain train crew consisting of certain persons, to-wit: a certain engineer, to-wit: a certain fireman, to-wit: a certain conductor, to-wit: a certain brakeman, to-wit: the said plaintiff's
104 intestate, was then and there engaged by means of a certain one of the locomotive engines of the said defendant, then and there operated by the said defendant, by and through its servants and agents in that behalf, to-wit: the said train crew, comprising the persons aforesaid, in transferring from the said certain tracks of the said

defendant in the yard last aforesaid, to a certain boat or barge of the said defendant, to-wit: barge number 14, certain freight and box cars, which then and there by means of the said barge and a certain one of the said tugboats or steamboats were thence *be* towed and transported by the said defendant, by its servants and agents in that behalf, as a common carrier aforesaid, then and there engaged in such commerce.

And the plaintiff's said intestate as said brakeman aforesaid was, at the time of suffering the injury hereinafter mentioned, in obedience to the rules, orders and requirements of the said defndant, and by virtue of his employment as such brakeman, engaged in the physical operation of the trains and cars of the said defendant, in the service of the said defendant requiring his presence on its trains, cars, barges, to-wit: on the said cars and on the said barge number 14, which said cars were then and there being transferred as aforesaid, and was then and there at the time of suffering said in-
105 jury, a person employed by the said defendant in such commerce, to-wit: in the interstate commerce aforesaid, within the meaning, purview and intendment of the act of Congress aforesaid; and the said plaintiff's intestate was entitled to the benefit of the provisions of the said act of Congress.

And thereupon, it became and was the duty of the said defendant to use ordinary care to furnish to the said intestate a reasonably safe place in which to perform the services required of him as such employe and brakeman of the said defendant as aforesaid, and to use ordinary care to provide reasonably safe and sufficient tracks, roadbeds, and boats upon and along which the service- required of the said intestate by the said defendant as aforesaid, were to be performed by him; yet, the said defendant not regarding its duty in that behalf, carelessly, negligently and wrongfully wholly failed and omitted to perform the same, in this particular, to-wit: that the said defendant carelessly, negligently and wrongfully provided as a part of its equipment, a certain boat or barge, to-wit: a certain barge designated as barge number 14, to which the said cars of the said defendant were, at the time of the injury to the said intestate hereinafter mentioned, being transferred from the said yard of the said defendant as aforesaid, and which was then and there moored
106 and made fast at one end thereof to a certain one of the said wharves or docks of the said defendant in the said yard of the said defendant at Port Norfolk, in the county of Norfolk and state of Virginia, which said boat or barge by reason of the manner of its construction and the location and construction thereon of the roadbed and tracks of the said defendant, to be used in transporting the trains and cars of the said defendant, by means of the said boat or barge, was a dangerous, defective, insufficient and unsafe place in and upon which to require of the said intestate that the duties and services of a brakeman of the said defendant should be performed by the said intestate, in the hauling, transferring and transportation of the trains and cars of the said defendant by means of the said boat or barge.

And the said plaintiff avers that the said boat or barge, to-wit: the

said barge number 14, and the railroad tracks and roadbed of the defendant constructed and located thereon were, due to the negligence of the defendant in that behalf, dangerous, defective, insufficient and unsafe as aforesaid, by reason of the fact that the said barge and the said railroad tracks and roadbeds of the said defendant thereof, were negligent-, defectively, insufficiently and improperly constructed in the following manner, to-wit: that the said
107 barge contained upon the deck thereof four certain railroad tracks extending from end to end of the said barge, and parallel with one another, except towards each extremity thereof, designed for the reception of freight and box cars in the course of the transportation thereof as aforesaid, of which said tracks two were situated on the one side of the central or medial line of said barge and converged at each end of said barge to a single track, af-ording a common means of communication for the two said tracks with the tracks of said yard; and two were situated on the other side of said line and converged at each end of said barge to a single track, likewise affording a common means of communication for the two last mentioned tracks with the tracks of the said yard; and of the said four railroad tracks situated upon said barge as aforesaid, those two certain railroad tracks next to the said central or medial line of the said barge, the one on the one side thereof and the other on the other side thereof, throughout the space where they ran parallel to each other, were distant from each other by a certain interval, to-wit: the interval of five and one-half (5½) feet, and were at or near the ends of said barge, where, by a gradual curve they attained their greatest degree of divergence and joined the said single track
108 communicating with the tracks of said yard as aforesaid, distant from each other by a certain interval, to-wit: the interval of ten (10) feet; and by reason of the arrangement, situation and construction of the two railroad tracks last aforesaid, to-wit: the said track situate on one side of, and next to, the said central or medial line of the said barge, and the said other track situated on the other side of, and next to, the said line, a box car or cars proceeding from the said dock or wharf upon the said barge, would gradually advance from a position at the end of said barge where the two said tracks last aforesaid were distant from each other, as aforesaid, by a certain interval, to-wit: the interval of ten (10) feet, to a certain other position, where the two said tracks last aforesaid were parallel and were distant from each other as aforesaid, by a certain interval, to-wit:—the interval of five and one-half (5½) feet, in the former of which said positions the eaves of the roof of the said box car or cars advancing as aforesaid on the one track would be distant from the eaves of the roof or roofs of a box car or cars standing on the other said track last aforesaid, and opposite the said car or cars advancing as aforesaid, by a certain interval, to-wit: the interval of six (6) feet, and in the latter of which said positions the eaves of the roof of said car or cars so advancing would be distant
109 from the eaves of the roof or roofs of a box car or cars standing on the other of the two said tracks last aforesaid and opposite the said cars thus advancing, by a certain interval, to-wit: the

interval of six (6) inches; and by reason of the premises, the close proximity aforesaid of the eaves of the roof or roofs of the said car or cars moving upon one of the said tracks when in the position last aforesaid to the eaves of the roof or roofs of the said car or cars aforesaid, standing upon the other of the two tracks last aforesaid, would inflict serious and deadly injury upon the person of the servants, employes and agents of the said defendant, and particularly upon the person of the plaintiff's intestate, who, in the course of their service as the servants and employes of the said defendant, should be caught or confined between the eaves of the roof or roofs of the said car or cars moving upon the one of the said tracks last aforesaid, and the eaves of the roof or roofs of the car or cars aforesaid, standing upon the other of the two tracks last aforesaid; of all which said premises the said defendant then and there had knowledge, or ought, in the exercise of ordinary care, then and there to have had knowledge.

And the said plaintiff avers that by reason of the said premises, and of the negligence of the said defendant as aforesaid, and
110 of the dangerous, defective, insufficient and unsafe construction and condition of the said barge number 14, and of the railroad tracks and roadbeds of the defendant thereon as aforesaid, due to the negligence of the defendant as aforesaid, the said intestate, on a certain day, to-wit: on the said 30th day of December, 1912, at a certain hour of said day, to-wit: at the hour of 8.30 a. m., while engaged and employed as aforesaid by the said defendant, in the capacity, and for the purpose of performing the duties, of a brakeman in the said certain yard of the said defendant, to-wit: the yard aforesaid, situate at Port Norfolk in the said County of Norfolk and state of Virginia, and as a member of that said certain train crew, to-wit: the train crew aforesaid, and while then and there engaged by means of a certain one of the locomotive engines of the said defendant aforesaid, then and there operated by the said defendant, by and through its said servants and agents in that behalf, in transferring from the said certain track of the said defendant in the said yard to a certain boat or barge of the said defendant, to-wit: the said barge number 14, *that* certain freight and box cars aforesaid, which then and there by means of the said barge, and a certain one of the said tug-boats or steamboats, aforesaid, were thence to
111 be towed and transported by the said defendant, by its servants and agents in that behalf, as a common carrier as aforesaid, then and there engaged in such commerce as aforesaid, was, while in the performance of his duty and employment in the capacity of brakeman aforesaid, and in the act of ascending a certain one of the said box cars then and there proceeding upon a certain one of the two said tracks, situated the one on the one *said* of, and next to, and the other on the other side of, and next to, the said medial line of the said barge, caught and confined between the eaves of the roof of the car which he was ascending as aforesaid, and the eaves of the roof or roofs of the car or cars standing upon the said railroad track situate on the other side of the said central or medial line and next thereto, and by means of the premises the said plaintiff's intestate

was then and there mangled, crushed and wounded, so that his ribs were broken, his lungs, his arm, to-wit: his left arm, and his shoulder were crushed, and other great, serious and fatal bodily and physical injuries the plaintiff's said intestate then and there sustained, so that in consequence of the injuries aforesaid, on a certain day, to-wit: on the 31st day of December, 1912, the said plaintiff's intestate languished and died.

112 And by reason of the said premises, the said plaintiff says that he has cause of action against the said defendant, and has suffered damages to the amount of Fifty Thousand Dollars ($50,000.00).

And for this also, to-wit: that heretofore to-wit: at the time of committing the wrongs and grievances hereinafter mentioned, the said defendant had been and was a corporation, operating a railroad, a part whereof extended from the terminals thereof in the town of Cape Charles, in the County of Northampton, in the state of Virginia, northward through the state of Virginia, and thence forward into the state of Maryland, and elsewhere; a part whereof, to-wit: certain terminals, to-wit: certain wharves, to-wit: certain docks, to-wit: a certain railroad yard, to-wit: certain tracks were situated at Port Norfolk, in the county of Norfolk, in the state of Virginia, a part whereof, to-wit: certain terminals, to-wit: certain tracks, to-wit: certain wharves, to-wit: certain docks were situated in the City of Norfolk, in the state of Virginia, and other parts whereof, to-wit: certain terminals, to-wit: certain railroad tracks, to-wit: certain wharves were situated elsewhere: upon along and over which railroad the said defendant hauled and operated trains of cars by means of locomotive engines, propelled by steam, for the trans-

113 portation of passengers and freight in its business which it then and there conducted and carried on as a common carrier of passengers and freight; and in conjunction and in connection with the said railroad as a part of the equipment, facilities and apparatus thereof, the said defendant also maintained and operated a certain floating equipment, consisting of certain boats, to-wit: certain barges, to-wit: certain tugboats, to-wit: certain steamboats, and particularly a certain barge sometimes designated as barge number 14, which said barges and which said barge number 14 in particular, were propelled by the said tugboats and steamboats, and plied between certain places, to-wit: between the said Port Norfolk and the said City of Norfolk, in the state of Virginia, to-wit; between the said Port Norfolk and the said town of Cape Charles, in the said state of Virginia, to-wit: between the said City of Norfolk and the said town of Cape Charles, in the said state of Virginia, as well as between certain other places; by means of which said barges and of the said barge number 14 in particular, towed and propelled as aforesaid by the said tugboats and steamboats, plying as aforesaid between the places aforesaid, the said defendant conveyed and transported freight and box cars and trains of freight and box cars, in pursuance of its business as a common carrier as aforesaid; and the said defendant, for the purpose of carrying on and con-

114 ducting its business aforesaid, hired and had in its service divers agents, employes and servants, to-wit: locomotive en-

gineers, to-wit: brakemen, to-wit: masters or captains of said barges, tugboats and steamboats, to-wit: yard masters, engaged in the physical operation of its trains, cars, engines, barges, tugboats and steamboats, and in service requiring their presence upon its said trains, cars, engines, barges, tugboats and steamboats.

And the said defendant, as such common carrier of passengers and freight, was, at the time of committing the said wrongs and grievances, engaged in certain commerce commonly called interstate commerce, to-wit: certain commerce between certain of the several states, to-wit: certain commerce between certain of the several territories, to-wit: certain commerce between certain of the states and territories, to-wit: certain commerce between the District of Columbia and certain of the states, to-wit: certain commerce between the District of Columbia and certain of the territories, to-wit: certain commerce between the District of Columbia and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the states and a certain foreign nation or certain foreign nations, to-wit: certain commerce between certain of the
115 territories and a certain foreign nation or certain foreign nations, within the meaning purview and intendment of that certain act of Congress of the United States of America, entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employes in Certain Cases," which was approved on April 22, 1908.

And the said defendant being the proprietor and operator of the said railroad and of the said boats, barges, tugboats and steamboats, heretofore, to-wit: on December 30, 1912, and for a certain space of time therefore, to-wit; the space of one day theretofore, the said plaintiff's intestate, who was then and there an infant of a certain age, to-wit: of the age of eighteen (18) years, and without pervious experience in, or knowledge of, the dangers, risks and perils of the service and employment in which he was then and there engaged, as hereinafter set forth, by the said defendant, at the special instance and request of the said defendant, had become and was a servant and employee of the said defendant, engaged and employed by the said defendant in the capacity, and for the purpose of performing the duties, of a brakeman, in a certain yard of the said defendant, to-wit: the yard aforesaid, situate at Port Norfolk, in the said County of Norfolk and state of Virginia, and as a member of a certain train crew, to-wit: that certain train crew con-
116 sisting of certain persons, to-wit: a certain engineer, to-wit: a certain fireman, to-wit: a certain conductor, to-wit: a certain brakeman, to-wit: the said plaintiff's intestate, was then and there engaged by means of a certain one of the locomotive engines of the said defendant, then and there operated by the said defendant, by and through its servants and agents in that behalf, to-wit: the said train crew comprising the persons aforesaid, in transferring from the said certain tracks of the said defendant in the yard last aforesaid, to a certain boat or barge of the said defendant, to-wit: barge number 14, certain freight and box cars, which then and there by means of the said barge and a certain one of the said tug-

boats or steamboats, were thence to be towed and transported by the said defendant, by its servants and agents in that behalf, as a common carrier aforesaid, then and there engaged in such commerce.

And the said barge number 14, to which the said cars were then and there being transferred as aforesaid, and which was then and there moored and made fast at one end thereof to a certain float or landing stage appurtenant to a certain one of the said wharves of docks of the said defendant, in the said yard of the said defendant, situated at Port Norfolk, in the said county of Norfolk and state of Virginia, as aforesaid, contained upon the deck thereof four
117 certain railroad tracks extending from end to end of the said barge and parallel with one another, except towards each extremity thereof, designed for the reception of freight and box cars in the course of the transportation thereof as aforesaid, of which said tracks two were situated on the one side of the central or medial line of said barge and towards each end of the said barge gradually converged, and eventually merged, in a single track common to both the two said tracks last above mentioned, affording to the two said tracks last above mentioned a common means of communication with the tracks of the said yard, which said single track extended shoreward from the said barge across and upon the certain said float or landing stage to which the said barge was then and there moored and made fast as aforesaid to the said wharf or dock of the said defendant in the said yard of the said defendant, at Port Norfolk, and thence forward into the said yard of the said defendant; and two were situated on the other side of the said line and towards each end of the said barge gradually converged, and eventually merged, in a single track common to both the two said tracks last above mentioned, affording to the two tracks last above mentioned a common means of communication with the tracks of the said yard, which said single track extended shoreward from the said barge across and upon the
118 certain said float or landing stage to which the said barge was then and there moored and made fast as aforesaid to the said wharf or dock of the said defendant in the said yard of the said defendant, at Port Norfolk, and thence forward into the said yard of the said defendant; and of the said four railroad tracks situated upon the said barge as aforesaid, those two certain railroad tracks next to the said central or medial line of said barge, the one on the one side thereof and the other on the other side thereof, throughout the space where they ran parallel to each other, were distant from each other by a certain interval, to-wit: the interval of five and one-half (5½) feet; and were, at or near the ends of said barge, where by a gradual curve they attained their greatest degree of divergence on the deck of the said barge distant from each other by a certain interval, to-wit: the interval of ten (10) feet, the distance as measured along the keel, or said medial line of the said barge from the end of the said barge, where the two tracks last aforesaid attained their various degree of divergence on the deck of the said barge, to the point where the two tracks last above mentioned attained their nearest degree of approach to each other on the deck of the said

barge, and became parallel as aforesaid, being a certain space,
119 to-wit: the space of twenty-five (25) feet; and by reason of the arrangement, situation and construction of the two railroad tracks last aforesaid, to-wit: the said track situate on one side of, and next to, the said central or medial line of the said barge, and the said other track situate on the other side of, and next to, the said line, a box car or cars proceeding from the said dock or wharf upon the said barge would gradually advance from a position at the end of said barge where the two said tracks last aforesaid were distant from each other as aforesaid by a certain interval, to-wit; the interval of ten (10) feet, to a certain other position, where the two said tracks last aforesaid, were parallel and were distant from each other as aforesaid by a certain interval, to-wit: the interval of five and one half (5½) feet, in the former of which said positions the eaves of the roof of the said box car or cars advancing as aforesaid on the one track would be distant from the eaves of the roof or roofs of a box car or cars standing on the other said track last aforesaid, and opposite the said car or cars advancing as aforesaid, by a certain interval, to-wit: the interval of six (6) feet, and in the latter of which said positions the eaves of the roof of said car or cars so advancing would be distant from the eaves of the roof or roofs of a box car or cars standing on the other of the two said tracks
120 last aforesaid, and opposite the said cars thus advancing, by a certain interval, to-wit: the interval of six (6) inches; and by reason of the premises the close proximity aforesaid of the eaves of the roof or roofs of the said car or cars moving upon one of the said tracks when in the position last aforesaid to the eaves of the roof or roofs of the said car or cars aforesaid, standing upon the other of the two tracks last aforesaid, would inflict serious and deadly injuries upon the person of the servants, emp-oyes and agents of the said defendant, and particularly upon the person of the plaintiff's intestate, who, in the course of their service as the servants and employes of the said defendant, should be caught or confined between the eaves of the roof or roofs of the said car or cars moving upon the one of the said tracks last aforesaid and the eaves of the roof or roofs of the car or cars aforesaid standing upon the other of the two tracks last aforesaid; of all which said premises the said defendant then and there had knowledge, or ought, in the exercise of ordinary care, then and there to have had knowledge; and the plaintiff's said intestate as said brakeman aforesaid, was, at the time of suffering the injury hereinafter mentioned, in obedience to the rules, orders and requirements of the said defendant, and by virtue of his employment as such brakeman, engaged in the physical operation of the
121 trains and cars of the said defendant, and in the service of the said defendant requiring his presence on its trains, cars and barges, to-wit: on the said cars and on the said barge number 14, which said cars were then and there being transferred as aforesaid and was then and there at the time of suffering the said injury, a person employed by the said defendant in such commerce, to-wit: in the interstate commerce aforesaid, within the meaning, purview and intendment of the act of Congress aforesaid; and the said plaintiff's

intestate was entitled to the benefit of the provisions of the said act of Congress.

And the said plaintiff avers that in the premises it became and was the duty of the said defendant, by and through its proper servant or agent, or its proper servants or agents in that behalf, before requiring the said plaintiff's intestate to perform the duty and service of brakeman as aforesaid, on the said trains and cars, then and there being transferred from the said wharf or dock in the said yard to the said barge, and then and there moving upon the said barge, properly and adequately in the premises to instruct the plaintiff's said intestate, who was then and there wholly without experience in, or knowledge, of the said service or duty which he was then and there performing as brakeman on the said train and cars, as
122 aforesaid, then and there moving upon the said barge number 14 as aforesaid, and wholly ignorant of, and inexpert in, the dangers, difficulties and perils attending upon his said service and duty arising out of the peculiar arrangement, situation and construction of the said railroad tracks upon the said barge as aforesaid, to-wit:—the said railroad track situate on one side of, and next to, the said central or medial line of said barge, and said other track situate on the other side of, and next to, the said line, and to admonish and warn him of the said difficulties, dangers and perils attending upon his said service and duty in the capacity of brakeman aforesaid, engaged as a member of the said train crew in transferring said trains and cars from the said wharf and dock to the said barge number 14, and arising out of the said peculiar, situation and construction of the said tracks upon the said barge, and the operation of transferring the said trains and cars from the tracks of the said yard to the tracks of the said barge, and of the proper means, method and manner of performing his said duty and service in the premises, in order that with reasonable safety in the premises hereinabove and hereinafter stated, he might perform his duty as brakeman upon said train and cars as aforesaid.

Yet, the said defendant, not regarding its duty in that behalf, carelessly, negligently and wrongfully wholly failed and omitted
123 to perform the same; and, on a certain day, to-wit: on the day and year last aforesaid, at a certain hour of the said day, to-wit: at the hour of 8.30 A. M., at a certain place at the said Port Norfolk, in the county of Norfolk and state of Virginia, aforesaid, to-wit: on the said barge number 14, then and there moored and made fast to the said float or landing stage appurtenant to the said dock or wharf of the said defendant in the said yard of the said defendant at Port Norfolk, in the said county and state, *and* did not, before requiring, directing and causing the plaintiff's said intestate to perform the duty and service of brakeman aforesaid on said trains and cars of the said defendant, then and there being transferred from the tracks in said yard to the tracks of said barge number 14, and then and there moving upon said barge, by and through its proper servant and agent, or proper servants and agents in that behalf, properly and adequately in the premises instruct and admonish and warn him of the said dangers, difficulties and perils attending his said service and duty in the capacity of brakeman as afore-

said engaged as a member of the said train crew in transferring said trains and cars from the said yard by means of the said wharf or dock to the said barge number 14, and arising as aforesaid
124 out out the said peculiar arrangement, situation and construction of the said railroad tracks last aforesaid upon the said barge, and the operation of transferring the said trains and cars from the said yard and the said wharf and dock to the said barge number 14, and of the proper means, method and manner of performing his said duty and service, in order that with reasonable safety in the premises hereinabove and hereinafter set forth, he might perform his said duty and service, so that by means of the premises the said plaintiff's intestate, while in the performance of his duty and service as brakeman at the time and place last aforesaid, upon the said trains and cars then and there being transferred from the said wharf or dock to the said barge number 14, and in the act of ascending a certain one of the said cars then and there proceeding and moving upon said barge upon a certain one of the said railroad tracks, situate on one side of the said central line of the said barge, and next thereto, was caught and confined between the eaves of the roof of the car which he was ascending as aforesaid, and the eaves of the roof or roofs of the car or cars standing upon the said railroad track situate on the other side of the said central line and next thereto, and by means of the premises the said plaintiff's intestate was then and there mangled, crushed and wounded, so that his ribs were broken, his lungs, his arms, to-wit: his left arm, and his shoulder were crushed, and other great, serious and fatal bodily and physical injuries the plain-
125 tiff's said intestate then and there sustained, so that in consequence of the injuries aforesaid, on a certain day, to-wit: on the 31st day of December, 1912, the said plaintiff's intestate languished and died.

And by reason of the said premises, the said plaintiff says that he has cause of action against the said defendant, and has suffered damage to the amount of Fifty Thousand Dollars ($50,000.00.)

And the said plaintiff further avers with reference to all and singular the foregoing counts of this declaration that the said intestate, to-wit: the said Richard T. Baugham, died unmarried, without children or issue whatsoever, and that of his said intestate's parents, his mother, to wit: Mrs. R. A. Baugham, who is now living, alone survived him; and that by reason of the premises, and by virtue of the act of Congress aforesaid, and the act amendatory thereof, to-wit: the act of Congress approved on the 5th day of April, 1910, he is entitled to prosecute this action for the recovery of and from the said defendant of the damages aforesaid, for the benefit of the said Mrs. R. A. Baugham.

And therefore he brings this suit.

BUFORD, LEWIS & PETERSON, *p. q.*

126 And at another day, to-wit:

VIRGINIA:

In the Circuit Court of Norfolk County, on the 6th day of October, 1913, the following order was entered:

KINDRED BAUGHAM, Administrator, Plaintiff,
vs.
NEW YORK, PHILADELPHIA AND NORFOLK R. R. Co., Defendant.

Case.

This day came the parties, by their attorneys, and the defendant, by counsel, demurred generally to the plaintiff's declaration and to each thereof, and the plaintiff joined in said demurrer. Thereupon the defendant plead "not guilty," to which the plaintiff replied generally and upon which plea issue is joined And on motion of the plaintiff, the defendant is required to file the grounds of its defense by November 1st, 1913. And by consent of all parties, by counsel, this cause is continued until December 2nd, 1913.

VIRGINIA:

In the Circuit Court of Norfolk County.

BAUGHAM'S ADMINISTRATOR
v.
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY.

127 *Grounds of Defense.*

1. The defendant will offer evidence to prove any and all matters which may be relied on under the general issue:
2. The defendant will offer evidence tending to show that the plaintiff's intestate was guilty of contributory negligence.
3. The defendant will offer evidence to show that it complied with each and every duty which it owed to the plaintiff's intestate.
4. The defendant will claim that the plaintiff's intestate assumed, when he entered the employment of the company, the risk of being injured in the manner charged in the declaration.
5. That its barge, the arrangement of the tracks thereon, and the manner of operating its cars over the same, was in accordance with the best usage with reference to such matters.

THOMAS H. WILLCOX, *p. q.*

And at another day, to-wit:

VIRGINIA:

Circuit Court of Norfolk County, November 14th, 1913, the following order was entered:

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased,
vs.
NEW YORK, PHILADELPHIA AND NORFOLK R. R. Co.

Trespass on the Case.

Order.

128 Whereas, B. A. Lewis, council for Kindred Baugham, Administrator of Richard T. Baugham, deceased, plaintiff in the above entitled cause, has made affidavit in due form according to the statute in such case, made and provided, that there is in the possession of F. J. Boyland, as yard master of the said defendant on December 30, 1912, at Port Norfolk, in Norfolk County, Virginia; in the possession of R. V. Massey, superintendent of the said defendant at Cape Charles, in Northampton County, Virginia; in the possession of G. W. Cherry, chief clerk or freight agent of the said defendant at Port Norfolk, in Norfolk County, Virginia; in the possession of J. Restein, train master of the said defendant at Cape Charles, in Northampton County, Virginia; in the possession of F. R. Savage, freight agent of the said defendant at Cape Charles, in Northampton County, Virginia; in the possession of B. G. Vincent, agent of the said defendant at the City of Norfolk, Virginia; in the possession of F. E. White, who on the 30th day of December, 1912, was a conductor employed by the said defendant; in the possession of H. L. Boyland, who on the 30th day of December, 1912, was a conductor employed by the said defendant; in the possession of Chas. H. Bradley, who, on the 30th day of December, 1912, was in the employ of the said defendant as assistant yard master at
129 Port Norfolk, in Norfolk County, Virginia; in the possession of W. J. Parker, who, on the 30th day of December, 1912, was in the employ of the said defendant as bridge foreman on a certain barge, to-wit: barge number 14 of the said defendant at Port Norfolk, in Norfolk County, Virginia; and in the possession of E. S. Johnson, who, on the 30th day of December, 1912, was captain of said barge number 14, of the said defendant, at Port Norfolk, in Norfolk County, Virginia;

Certain writings and documents showing the numbers and specific designation of those certain railroad cars which, on December 30, 1912, in the forenoon of said day, were transferred from the yards of the said defendant at Port Norfolk, in Norfolk County, Virginia, to the said barge number 14 of the said defendant, and were thence by means of said barge transported and dispatched; also the num-

bers and specific designations of those certain railroad cars, which by means of the said barge, were, on the day last aforesaid, conveyed and transported from the said wharves and docks of the said defendant at Port Norfolk, in Norfolk County, Virginia, to another point or other points; also as to certain railroad cars which were in the forenoon of the day last aforesaid, from the yards of the said defendant at Port Norfolk, in the County and state last aforesaid, transferred to the said barge number 14 of the said defendant, the point or points at which, and the carrier or railroad company, or
130 carriers or railroad companies from which, the said cars last aforesaid were received by the said defendant for transportation to the point or points to which, by means of the said barge and the said New York, Philadelphia and Norfolk Railroad Company, they were severally destined, as well as the point or points to which the said cars were severally destined as aforesaid; and as to certain other cars which, in the forenoon of the day last aforesaid, from the yards of the said defendant at said Port Norfolk, in the county and state last aforesaid, were transferred to the said barge number 14, of the said defendant, and which, not having been received for transportation by the said defendant from any other carrier, were in the custody of the said defendant when the transportation thereof severally began on the occasion in question, the point or points at which the transportation thereof severally began as aforesaid, and the point or points to which the said cars, respectively, were destined; and certain writings and documents showing the shipments of freight which were contained in those certain cars which were, from the yards of the said defendant at said Port Norfolk, in the county and state last aforesaid, transferred to the said barge number 14 in the forenoon of the said 30th day of December, 1912, the point respectively, at which said shipments of freight originated, the
131 points at which said shipments of freight respectively, were received by the said defendant for transportation, and the points to which said shipments of freight were distined.

It is therefore ordered, that the Clerk of this Court do forthwith issue subpœnas duces tecum to compel the production of the aforesaid writings and documents, on the 2nd day of December, 1913, at ten o'clock a. m., in the Circuit Court for the County of Norfolk, Virginia.

VIRGINIA,

Brunswick County, To wit:

I, J. R. Owens, a Notary Public, in and for the county aforesaid, in the state of Virginia, do certify that B. A. Lewis, counsel for Kindred Baugham, Administrator of Richard T. Baugham, deceased, plaintiff in that certain action of trespass on the case, pending in the circuit court of Norfolk County, Virginia, wherein the said Kindred Baugham, Administrator, etc., is plaintiff as aforesaid, and the New York, Philadelphia and Norfolk Railroad Company, a corporation, is defendant, this day personally appeared before me, and made oath before me in my county aforesaid that

there is in the possession of F. J. Boyland, as yard master of the said defendant on December 30, 1912, at Port Norfolk in Norfolk
County, Virginia, in the possession of R. V. Massey, super-
132 intendent of the said defendant at Cape Charles, in North-
ampton County, Virginia; in the possession of G. W. Cherry, chief clerk or freight agent of said defendant at Port Norfolk, in Norfolk County, Virginia; in the possession of J. Restein, train master of the said defendant at Cape Charles, in Northampton County, Virginia; in the possession of F. R. Savage, freight agent of the said defendant at Cape Charles, in Northampton County, Virginia; in the possession of B. G. Vincent, agent of the said defendant at the City of Norfolk, Virginia; in the possession of F. E. White, who, on the 30th day of December, 1912, was a conductor employed by the said defendant; in the possession of H. L. Boyland, who, *one* the 30th day of December, 1912, was a conductor employed by the said defendant; in the possession of Charles H. Bradley, who, on the 30th day of December, 1912, was in the employ of the said defendant as assistant yard master at Port Norfolk, in Norfolk County, Virginia; in the possession of W. J. Parker, who, on the 30th day of December, 1912, was in the employ of the said defendant as bridge foreman on a certain barge, to-wit: barge number 14 of the said defendant, at Port Norfolk, in Norfolk County, Virginia; and in the possession of E. S. Johnson, who on the 30th day of December, 1912, was captain of said barge number 14 of the said defendant at Port Norfolk,
Norfolk County, Virginia;

133 Certain writings and documents showing the numbers and specific desig*an*tions of those certain railroad cars which, on December 30, 1912, in the forenoon of said day, were transferred from the yard of the said defendant at Port Norfolk, in Norfolk County, Virginia, to the said barge number 14 of the said defendant, and were thence by means of said barge transported and dispatched; also the numbers and specific desig*an*tions of those certain railroad cars, which, by means of the said barge, were, on the day last aforesaid, conveyed and transported from the said wharves and docks of the said defendant at Port Norfolk, in Norfolk County, Virginia, to another point or other points; also, as to certain railroad cars which were, in the forenoon of the day last aforesaid, from the yards of the said defendant at Port Norfolk in the County and state last aforesaid, transferred to the said barge number 14 of the said defendant, the point or points at which and the carrier or railroad company, or carriers or railroad companies from which, the said cars last aforesaid were received by the said defendant for transportation to the point or points to which, by means of the said barge and the said New York, Philadelphia and Norfolk Railroad Company, they were severally destined, as well as the point or points
to which the said cars were severally destined as aforesaid,
134 and as to certain other cars which in the forenoon of the
day last aforesaid, from the yards of the said defendant at said Port Norfolk, in the County and State last aforesaid, were transferred to the said barge number 14 of the said defendant, and

which, not having been received for transportation by the said defendant from any other carrier, were in the custody of the said defendant when the transportation thereof severally began on the occasion in question, the point or points at which the transportation thereof severally began as aforesaid, and the point or points to which the said cars, respectively were destined; and certain writings and documents showing the shipments of freight which were contained in those certain cars which were, from the yards of the said defendant at said Port Norfolk, in the county and state last aforesaid, transferred to the said barge number 14 in the forenoon of the said 30th day of December, 1912, the points, respectively, at which said shipments of freight originated, the points at which said shipments of freight, respectively, were received by the said defendant for transportation, and the points to which said shipments of freight were destined.

And the said B. A. Lewis, counsel for the said Kindred Baugham, Administrator as aforesaid, further made oath before me that the said writings and documents are material and proper to be produced before the circuit court of Norfolk County, Virginia,
135 at the trial of the aforesaid action, on behalf of the said plaintiff.

Given under my hand this 12th day of November, 1913.

J. R. OWENS,
Notary Public.

And at another day, to-wit:

In the circuit court of Norfolk County on the 2nd day of December, 1913, the following order was entered:

This day came the parties, by their attorneys, and the defendant's demurrer to the plaintiff's declaration being fully argued, the court takes time to consider thereof.

And at another day, to-wit:

In the Circuit Court of Norfolk County on the 3rd day of December, 1913, the following order was entered:

This day again came the parties, by their attorneys; and the Court having fully considered the defendant's demurrer to the plaintiff's declaration, doth overrule the same. Thereupon came a jury, to-wit: J. J. Morse, F. R. Clendenning, W. H. Lane, John Dyer, Phillip Dozier, Kenneth R. Hall and Robert F. Rose, who were duly sworn the truth to speak upon the issue joined, and having fully heard the evidence, were adjourned until to-morrow morning at ten o'clock.

136 And at another day, to-wit:

In the circuit court of Norfolk County, on the 4th day of December, 1913, the following order was entered:

This day again came the parties, by their attorneys, and the jury adjourned over on yesterday appeared pursuant to their adjournment. Thereupon the defendant filed its demurrer to the evidence of the plaintiff, and the plaintiff joined in said demurrer. Whereupon the said jury being required to say what damages the plaintiff hath sustained if judgment shall be given for the plaintiff upon

the evidence in this case, retired to their room to consult of a verdict, and after sometime returned into court, having found the following verdict: "We the jury, upon our oaths do say, that if upon the demurrer to the evidence the law be for the plaintiff, then we find for the plaintiff and assess the damages which he ought to recover at ten thousand dollars. If the law be for the defendant, then we find for the defendant." Thereupon the demurrer to the evidence of the plaintiff being fully argued, it seems to the Court here that the said evidence is not sufficient in law to maintain the issue joined on the part of the plaintiff, and the Court doth sustain the said defendant's demurrer to the evidence. Therefore it is considered that the plaintiff take nothing for his suit, but for
137 his false clamor be in mercy, etc., and that the defendant recover against the plaintiff its costs by it about its defense in this behalf expended.

And at another day, to-wit:

In the circuit court of Norfolk county, on the 31st day of December, 1913, the following order was entered:

This day came again the parties, by their attorneys, and the defendant, tendered its bill of exceptions No. 1, which was received by the Court and signed, sealed and made a part of the record in this case.

Defendant's Bill of Exception No. 1.

VIRGINIA:

In the Circuit Court of Norfolk County.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased,

v.

NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, a Corporation.

Be it remembered that on the trial of this cause, after all the evidence had been submitted to the jury, and which is set out in the demurrer to the evidence, which is here referred to for the
138 purpose of this Bill of Exceptions, the plaintiff requested the Court to instruct the jury as follows:

"The Court instructs the jury that the right of action given by law to Richard T. Baugham for the injury suffered by him, as alleged in the declaration, survives to the plaintiff, his personal representative, for the benefit of Mrs. R. A. Baugham, the mother of said Richard T. Baugham, and the jury may award the plaintiff, subject to the judgment of the Court on the demurrer to the evidence such damages, not to exceed $50,000.00, as the jury, in view of the facts and circumstances disclosed by the evidence, may regard as the amount of damages to which the said Richard T. Baugham would himself before his death have been entitled to receive on account of his mental and physical suffering caused by said injury. But if

the jury should believe from the evidence that the said Richard T. Baugham was himself guilty of negligence, which contributed to cause said injury, the damages shall be diminished by the jury in proportion to the amount of negligence, if any, which they may believe from the evidence is attributable to the said Richard T. Baugham." This being the only instruction on the measure of damages.

And the defendant objected to the giving of said instruc-
139 tion, but the Court overruled the objection and granted the instruction as prayed for, to which action of the Court in overruling said objection and granting said instruction, the defendant, by counsel, excepted, and tendered this its bill of exceptions No. 1, and prayed that the same be signed, sealed and made a part of the record, which is accordingly done.

Given under my hand and seal this 31 day of Dec. 1913.

J. T. LAWLESS, [SEAL.]
Judge of the First Judicial Circuit of Virginia.

And at another day, to-wit:

In the Circuit Court of Norfolk County, on the 30th day of January, 1914, the following order was entered:

This, 30th day of January, 1914, again came the parties, by their attorneys; and it appearing that on the trial of this cause, the plaintiff excepted to the opinion and judgment of the Court in the admission and exclusion of evidence tendered on behalf of the parties, plaintiff and defendant, and tendered his six bills of exception numbered 1, 2, 3, 4, 5, and 6, which bills of exception were received, signed and sealed by the Judge of this Court within thirty days from the adjournment and end of the term of Court at which
140 the final order in this case was entered, and are ordered to be made a part of the record in this cause.

Bill of Exceptions No. 1.

KINDRED BAUGHAM, Administrator, Plaintiff,
vs.
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, Defendant.

Plaintiff's Bill of Exceptions No. 1.

Be it remembered that on the trial of this cause, and after the jury had been sworn and empanelled to try the issue joined, counsel for defendant propounded to the witness, Edward Richardson, a witness introduced on behalf of the defendant, the following question:

"Q. Has the C. & O. Railroad occasion to use similar floating property?"

To which the witness replied,

"A. They have been chartering our barges on several occasions,

and the last barge they built we furnished them a copy of our plans to build it."

Thereupon, the following question was propounded to the witness by counsel for the defendant,

"Q. And it is built on the same plan as this one?" To which the witness, continuing, answered,

141 "A. On October they began the three track barge, with the center track diverging in the side track like ours. The tracks diverge in the center, and there were three tracks on it."

To which said questions and answers, the plaintiff, by counsel, objected, upon the ground that it was a comparison of methods between two employers, which objection was overruled by the Court, as appears from the evidence set out in the demurrer to the evidence, which is hereby referred to and made a part of this bill of exceptions.

To which action and ruling of the Court, the plaintiff excepted, and prays that this his first bill of exceptions may be signed, sealed, enrolled and made a part of the record, which is according- done this 30 day of January, 1914, and within 30 days from the adjournment of the Court at which the final judgment in this action was entered.

J. T. LAWLESS, [SEAL.]
Judge of the 1st Judicial Circuit of Virginia.

O. K.
T. H. W.

142 KINDRED BAUGHAM, Admr., Plaintiff,
vs.
NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY,
Defendant.

Plaintiff's Bill of Exceptions No. 2.

Be it remembered that on the trial of this cause, and after the jury had been sworn and empanelled to try the issue joined, counsel for defendant propounded to Edward Richardson, a witness introduced on behalf of the defendant, the following question:

"Q. I will change the question. It is not clear. Considering the familiarity you have with the selection, and experience in the service, and handling of barges, and in the construction of them, please state whether or not, for the service as it is arranged on that barge, is that a reasonably safe barge?"

To which question the witness replied,

"A. Yes, sir."

To which said question and answer, the plaintiff, by counsel objected, upon the ground that what is ordinary care is not a question for the witness to express an opinion upon, and he should not give his opinion upon that question, but that the same is a question for the jury to determine, and not for the witness, which objec-

143 tion was overruled by the court, as appears from the demurrer to the evidence, by the defendant, including the evi-

dence which is hereby referred to and made a part of this bill of exceptions.

To which action and ruling of the court, the plaintiff excepted, and prays that this his second bill of exceptions may be signed, sealed, enrolled and made a part of the record, which is accordingly done this 30 day of January, 1914, and within 30 days from the adjournment of the court at which the final judgment in this action was entered.

J. T. LAWLESS, [SEAL.]
Judge of the 1st Judicial Circuit of Virginia.

O. K.
T. H. W.

KINDRED BAUGHAM, Administrator, Plaintiff,
vs.
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, Defendant.

Plaintiff's Bill of Exceptions No. 3.

Be it remembered that on the trial of this cause, and after the jury had been sworn and empanelled to try the issue joined, one Harry L. Boyland, a witness introduced on behalf of the defendant, was recalled by the plaintiff for further cross-examination, whereupon the following question was propounded to him by counsel for the plaintiff:

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"Q. You heard what he said, and you recall what you said on your own examination. Now, what I want to know is, did you or not on the occasion of this conversation go further and say that if the young man had been with you the next day, the day he received the fatal injury, that you could have given him further instruction that would have saved him from injury?"

To which question, the defendant, by counsel, objected, which objection, being sustained by the court, the plaintiff, by counsel, excepted, as appears from the demurrer to the evidence by the defendant, including the evidence which is hereby referred to and made a part of this bill of exceptions.

To which action and ruling of the court in sustaining the said objection, the plaintiff excepted, and prays that this his third bill of exceptions may be signed, sealed, enrolled and made a part of the record, which is accordingly done this 30 day of January, 1914, and within 30 days from the adjournment of the court at which the final judgment in this action was entered.

J. T. LAWLESS, [SEAL.]
Judge of the 1st Judicial Circuit of Virginia.

O. K.
T. H. W.

145 KINDRED BAUGHAM, Admr., Plaintiff,
vs.
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, Defendant.

Plaintiff's Bill of Exceptions No. 4.

Be it remembered that on the trial of this cause, and after the jury had been sworn and empanelled to try the issue joined, one Harry L. Boyland, a witness introduced on behalf of defendant, was recalled by the plaintiff for further cross-examination, whereupon the following question was propounded to him by counsel for the plaintiff:

"Q. Did you, on that occasion, say that if you had been with him, or he had been working with you the next day, you would have given him further instruction?"

To which question, the defendant, by counsel, objected, which objection, being sustained by the court, the plaintiff, by counsel, excepted, as appears from the demurrer to the evidence, by the defendant, including the evidence, which is hereby referred to and made a part of this bill of exceptions.

To which action and ruling of the court in sustaining the said objection, the plaintiff excepted, and prays that this his
146 fourth bill of exceptions may be signed, sealed, enrolled and made a part of the record, which is accordingly done this 30th day of January, 1914, and within 30 days from the adjournment of the court at which the final judgment in this action was entered.

J. T. LAWLESS, [SEAL.]
Judge of the 1st Judicial Circuit of Virginia.

O. K.
T. H. W.

KINDRED BAUGHAM, Admr., Plaintiff,
vs.
NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, Defendant.

Plaintiff's Bill of Exceptions No. 5.

Be it remembered that on the trial of this cause, and after the jury had been sworn and empanelled to try the issue joined, one Harry L. Boyland, a witness introduced on behalf of the defendant, was recalled by the plaintiff for further cross-examination, whereupon the following question was propounded to him by counsel for the plaintiff:

"Q. Did you, or not, say on that occasion of that conversation, that you had not completed the instruction which you would have given him if he had worked with you the next day—that you
147 would have instructed him further with reference to the dangers of the duties which he had undertaken?"

To which question, the defendant, by counsel, objected, which objection, being sustained by the court, the plaintiff by counsel, excepted, as appears from the demurrer to the evidence, by the defendant, including the evidence which is hereby referred to and made a part of this bill of exceptions.

In the Circuit Court of Norfolk County, Virginia.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased,

v.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, a Corporation.

Demurrer to Evidence.

Be it remembered that after the jury was sworn to try the issue joined in this case, the plaintiff and defendant introduced the following evidence, which is all the evidence that was introduced, and which is made a part of this demurrer to evidence.

The plaintiff to prove and maintain the said issue on his part introduced the following evidence:

148 In the Circuit Court of Norfolk County, Virginia.

KINDRED BAUGHAM, Administrator,

v.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD CO.

Testimony.

Before Hon. Joseph T. Lawless and Jury.

PORTSMOUTH, VIRGINIA, Dec. 3rd, 4th, and 5th, 1913.

Present:

Messrs. Buford, Lewis and Peterson, for the Plaintiff.
Judge T. H. Willcox, for the defendant.
D. S. Phlegar, Shorthand Reporter, Norfolk, Virginia.

NOTE.—At the request of counsel for the plaintiff, the witnesses were excluded from the Court room.

NOTE.—It is admitted, on behalf of the defendant, that the plaintiff is the duly qualified administrator, and that the defendant, company was engaged in interstate commerce at the time of the accident, and that the plaintiff's intestate is entitled to sue under
149 the fellow-servant act, or what is commonly known as the Employers' Liability Act, and that the plaintiff's intestate, Richard T. Baugham, was employed by the company.

After the opening statements by Mr. Buford, on behalf of the plaintiff, counsel for the defendant announced that he did not care to make any opening statement, as the facts would be proven by the evidence, whereupon, the plaintiff, to sustain the issue on his part, introduced the following evidence:

Mrs. ROBERTA A. BAUGHAM, being duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. BUFORD:

Q. Please give us your name?
A. Mrs. Roberta Baugham.
Q. Mrs. Roberta A. Baugham?
A. Yes, sir.
Q. You are the mother of Richard T. Baugham, whose injury and death is the subject of this trial, are you not?
A. I am.
Q. When was he born?
150 A. He was born the 14th of March, 1893.
Q. At the time of his death, and at the time of receiving the injury of which he died, he was in the employment of the New York, Philadelphia and Norfolk Railroad Company, was he?
A. Yes, sir.
Q. Will you please state to the jury when he entered the service of the company, and under what circumstances?
A. He entered on Sunday morning, I think, about eight or nine o'clock. He had dressed to go to church, and the call boy came around for him and he undressed, and put on his overalls, and worked until seven o'clock that evening, and he came home to supper, and went to church, and the next morning he left at six o'clock, I think. He was called very early, and went to his work. At about 8:30 or 9 we heard of his being hurt. The news was sent me he was hurt. That was the time he received his injury on the yard. He had only worked one day and that part of the morning.
Q. You say he was employed on Sunday after he had dressed to go to church?
A. That was the time he was called.
Q. Yes. What Sunday was that?
A. It was the last Sunday in the year; what date was that?
151 Q. The 29th of December, 1912?
A. Yes, sir.
Q. So, then, he received the injury sometime on Monday morning December 30th, 1912?
A. 1912.
Q. How long did he live after receiving the injury?
A. He died at 2:30 the next day, the last day of the year, somewhere near half past two or three o'clock.
Q. Now what had been his business heretofore—before entering the service of the railroad company?
A. He worked at carpenter work two years, and he had been in

the drug store ever since we have been to Port Norfolk until about twelve months before, and he worked at the carpenters' trade.

Q. How long had he lived in Port Norfolk?

A. Five years, exactly, the day he was killed.

Q. Did he render you any pecuniary aid, Mrs. Baugham; did he furnish you any money to enable you to live?

A. He gave me all his earnings, except what it took for his own use during the week.

Q. What?

A. After taking out for his own use, all the rest was handed
152 over to me.

Q. Were you dependent upon him for maintenance and support?

A. I am dependent on my sons.

Q. How many sons have you?

A. Three, two single and one married.

Q. You have three now?

A. No, I only have two now.

Q. How many of those are married?

A. One married, one single.

Q. One married, one single?

A. Yes, sir.

Q. Was the one who was married married before or after the accident to your son Richard?

A. Before.

Q. So, at the time of the injury to Richard T. Baugham you had two unmarried sons?

A. Yes, sir, two unmarried sons.

Q. And you were dependent upon them for your support?

A. Yes, sir, for support.

Q. You have some daughters, I believe?

A. I have three daughters.

153 Q. All married?

A. Two married, one single.

Q. Is the single one of age, or an infant?

A. She is of age.

Q. Have you any property or means of support?

A. No.

Q. Is the father of Richard T. Baugham living?

A. No, sir.

Q. You are his only surviving parent?

A. Yes, sir.

Q. And you are a widow?

A. Yes, sir.

Q. Was his father dead at the time of the injury?

A. Yes, sir, his father died when he was three months old.

Q. You have not married since?

A. No, sir.

Q. Was the boy strong and healthy?

A. I think his health, at the time, was better than it ever was during his life.

Q. What were his habits of life?
A. He was a boy to be relied on. He had no bad habits I know of.
Q. At that time what wages was he receiving?
154 A. At the time?
Q. Of the injury?
A. From the yard?
Q. Yes.
A. I don't know that I heard him say. He went to work Sunday morning, and was on all day, and that Monday morning he had to leave so hurriedly that I never asked him, and I never heard him say.
Q. Do you know whether the contract of employment was entered into on Sunday morning or Saturday evening?
A. He told me Saturday evening when he came in that he had signed up for it.
Q. For this position?
A. Yes, sir. That is all I heard him say.
Q. What did he earn in the drug store, and as a carpenter, while following those two callings?
A. Really I don't exactly know what he earned at carpenter work, but at the drug store I think he got ten or twelve dollars a week.
Q. I suppose his work at the carpenter's trade was——
A. It was not so regular.
Q. It depended, of course,——
A. Upon the time he made. He worked by the hour.
155 Q. Well, was he a boy who was dutiful and kind to you?
A. He was dutiful. He never disobeyed me in his life.
Q. What I want to know is did he have those feelings of affections for you upon which you could depend for support?
A. When he told me he would do a thing I expected it, and knew he would perform what he said he would.
Q. Were his relations, his feelings for you such as you feel you could say to the jury you could look to him in the future for support?
A. It was. I never had any doubt as to all my boys.
Q. What was your age at the time he received this injury?
A. Fifty-seven.

Cross-examination.

By Judge WILLCOX:

Q. Mrs. Baugham, where did you live before you came to Port Norfolk?
A. Rich Square.
Q. North Carolina?
A. North Carolina.
Q. When were you married?
A. I was married in '90, I think. Oh no, (pause), I have forgotten that date.
Q. What did you say?
156 A. I have forgotten the exact year I was married. I was married 30 years. That makes what date?

By Mr. BUFORD: That would make 1883.
A. I was married in 1880. I have been married 32 years.

By Judge WILLCOX:

Q. What month?
A. The 28th of December.
Q. 1880.
A. 33 years this month.
Q. How many children did you have?
A. Six.
Q. When was the first child born?
A. He was born in 1882.
Q. When the next one?
A. '84.
Q. The next?
A. '86.
Q. The next one?
A. '88.
Q. The next one?
A. (Pause.) That is five, isn't it?
Q. Yes.
A. '93.
Q. You had no children between '88 and '93?
A. I only had six children.
Q. Your son, as I take it, was a nice intelligent boy—man?
A. Yes.
Q. You say he worked as a carpenter?
A. Yes, sir.
157 Q. Did he work as a carpenter down — North Carolina?
A. No. He was in knee pants then. He worked at Bailey's Drug Store.
Q. When did you come to Port Norfolk?
A. You know I can't remember dates. I had been there five years the day he was hurt.
Q. And he did what when you first came to Port Norfolk?
A. In Mr. Bailey's Drug Store.
Q. How long did he work there?
A. Until the year before he was hurt. I think twelve months, or probably a few months more.
Q. He worked practically at Mr. Bailey's Drug Store and then carpenter work for a year?
A. His health was not so good there, it was too close and the Doctor advised him to take out door exercise.
Q. Where did he learn his trade as a carpenter?
A. He only took tools and went to work. He worked for Mr. J. N. Harris. He never worked for any other but him that I know of.
Q. He was a bright intelligent boy?
A. Yes, sir.
Q. It was a great pleasure to you to associate with him, he was so intelligent?

158 A. He was pleasant with every one he came in contact with.

Q. You think he got $10.00 a week at the drug store?

A. Yes, sir.

Q. It cost something for him to live?

A. His expenses come out of that.

Q. How much was his expense?

A. I don't know.

Q. How much did he give you?

A. Some weeks ten dollars and sometimes five dollars?

Q. Did he give you any fixed amount?

A. No, he gave me along what he could.

Q. He did not turn over his entire wages to you, but always took out sufficient for his expense?

A. Yes, sir.

Q. You don't know what they were?

A. I think I heard him say how much he was getting.

Q. You and he did not have any understanding as to any regular amount?

A. Oh, no, no regular amount.

Q. I suppose you talked to him about when he was born?

A. Talked to him?

159 Q. You had told him when he was born?

A. Yes, sir.

Q. He had sense enough to understand that?

A. Yes, sir.

Q. That is the way children know when they are born, is it not?

A. Yes, sir, that is the way children know and there is the family record.

Q. How tall a boy was he?

A. How tall?

Q. What size?

A. I think about six feet, about as tall as his brother.

Q. How much did he weigh?

A. I think—how much did he weigh (speaking to her daughter)?

NOTE.—The daughter stated it was 172 pounds.

WITNESS: 172 pounds.

GEORGE HARRIS (colored), being duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. BUFORD:

By Mr. BUFORD: I forgot to ask Mrs. Baugham a question. I would like to do so now.

By Judge WILLCOX: Well.

160 By Mr. BUFORD:

Q. Had your son ever worked on the railroad before?

MRS. BAUGHAM: No indeed. He never had any business there, and never had been on it I don't suppose.

Judge WILLCOX: I object to her telling what she supposes.

By Mr. BUFORD:

Q. You know he had never been employed by the railroad company?

A. No, sir, I know he had not.

NOTE.—Mr. Buford takes up the examination of George Harris.

By Mr. BUFORD:

Q. Your name is George Harris?

A. Yes, sir.

Q. Where do you live?

A. Sir?

Q. Where do you live?

A. Pinners Point.

Q. What is your occupation?

A. Brakeman.

Q. Employed by what railroad company?

A. The New York, Philadelphia & Norfolk Railroad Company.

Q. Where were you on the 30th day of last December when Richard T. Baugham was injured in the service of the company?

A. I was working for the company.

Q. At what place?

A. On the cars.

161 Q. Well, at what place on the road—were you on the barge No. 14?

A. I was handling the cars on barge 14.

Q. At Port Norfolk, Virginia?

A. Yes, sir.

Q. In Norfolk County?

A. Yes, sir, Norfolk County.

Q. Now tell the jury, so far as you know, accurately, how the accident happened to Mr. Baugham?

By Mr. PETERSON: Talk out loud so the jury and court can hear you.

A. We was loading barge 14, shoving cars on barge 14, December 30th, 1912. We loaded the East side, and were on the West side, and we shoved the cars on the East sidetrack, and pulled back to shove on the center track. Mr. Baugham was located on the side track to signal to go ahead on the center track. We shoved the cars on the center track, about two car lengths or something like that, and I saw Mr. Baugham climbing up the side of the car, and gave the signal to stop, and stopped, but it rolled him between the cars.

Q. It rolled him between the cars?

A. Yes, sir.

Q. Well, was he caught as you first saw him?

A. No, not exactly caught when I first saw him.

Q. How high was his head above the roof of the car?

162 A. When I first saw him his head was about even with the car.

Q. The roof of the car he was climbing on?
A. Yes, sir, and I turned off and gave the man stop signals, and I looked back, and I saw him turning, saw his head turned, and I didn't see any more. I just glimpsed him, and I didn't stand and look at him.
Q. Now, I understand you to say that just before the accident you saw Mr. Baugham climbing up the side of the car?
A. Yes, sir.
Q. On the left center track?
A. Left center track, yes, sir.
Q. He was climbing up on the side next to the rear center track?
A. Yes, sir.
Q. His head was about the top of the car he was climbing?
A. As well as I could see, yes, sir.
Q. You saw then he was going to get caught immediately?
A. Yes, sir.
Q. He was caught immediately between the car he was climbing on and the car standing on the next center track?
A. Yes, sir.
Q. You saw him roll between the cars?
A. Yes, sir, I saw him fall between the cars.
163 Q. They were close enough there at that point to crush a man to death?
A. Yes, sir.
Q. The tracks then converged there so as to bring the tops of the cars dangerously near together for any climbing on them?
A. Yes, sir.
Q. Now, what position did you occupy; where were you standing?
A. On the head car next to the engine.
Q. The engine was on the side next to the dock?

By Mr. WILLCOX: The end you mean.

By Mr. BUFORD:

Q. On the end, the right hand side?
A. And the engine was ashore.
Q. You were on the head of that train?
A. Yes, sir.
Q. Was he climbing the side ladder used by brakemen to climb box cars?
A. Yes, sir.
Q. He was a brakeman, wasn't he?
A. Yes, sir.
Q. He had been employed as a brakeman?
A. Yes, sir.
Q. That was what he was going on the car for?
A. He was going up to reach the cord to put the brake on.
Q. That was his duty, wasn't it?
164 A. It was his duty to put the brakes on.
Q. On the car he was climbing?
A. Yes, sir, on the car he was climbing.

Q. How long have you worked there?
A. Seven years, near eight years.
Q. Near eight years?
A. Yes, sir.
Q. You had worked there about seven years before Mr. Baugham got injured?
A. Yes, sir, fully seven.
Q. Now, tell the jury about how the center tracks on the barge are located with reference to each other? What I want to know now is are they the same distance apart where they come from the dock on the barge, as they were down where Mr. Baugham got caught between the cars?
A. How is that?
Q. Now, tell the jury about how the center tracks on the barge are located with reference to each other? What I want to know is are they the same distance apart where they come from the dock on the barge, as they were down where Mr. Baugham got caught between the cars?
A. No, sir, not the same distance.
Q. How far apart are the two tracks, I mean between the inside rails, where they come upon the barge?
165 A. I don't know, sir. I don't know the distance.
Q. About how far would you say?

By Judge WILLCOX: We will put the plat in later.

A. I don't know. I never measured.

By the COURT:

Q. Can you give us any idea as to the number of feet?
A. No, sir, I could not give any idea.

By Mr. BUFORD:

Q. Could you give any idea as to the number of feet they are apart at the place where the accident occurred?
A. No, sir.
Q. Is there sufficient space between these tracks, where they come upon the barge, and for some distance before you reach the place of the accident, for a man to climb up the ladder in safety?
A. As far as the cars are concerned they are wide enough apart, but we never climb up between, or we would get knocked off by the flag-pole.
Q. But for the flag-pole?
A. But for the flag-pole they would be wide enough.
Q. Between the track-?
166 A. Yes, sir, from the dock on the barge.
Q. Leaving out of view the obstruction occasioned by the presence of the flag-pole, just suppose there were not any flag poles there, so far as the tracks are concerned, now, there was plenty of space a part of the way after entering the barge for a man to have climbed up in safety?
A. Where the tracks come on the barge?
Q. Yes.

A. Yes, sir.
Q. For what distance did that space extend along the barge?
A. I don't know.
Q. You would not be able to say how many feet?
A. No, sir, I would not be able to say how many feet.
Q. You say Mr. Baugham was climbing the car on the right side of the car that was going down the left center track?
A. Yes, sir.
Q. Suppose he had been on the other side of that car, could he, or not, have climbed in safety between that and the outside track?
A. Yes, sir, there is room enough.
Q. Room enough all the way?
A. At the part where he was.
Q. Where he was caught there was?
167 A. Yes, sir.
Q. If he had been on the other side of the same center line he would have been safe?
A. Yes, sir.
Q. You said you were a brakeman too?
A. Yes, sir.

NOTE.—The ownership of the barge by the defendant, that the railroad was owned by the company, and operated by them at the time is admitted.

By Mr. BUFORD:

Q. You could not give the width or length of the barge, could you?
A. No, sir.
Q. You did not see the body of Mr. Baugham—you did not see him after he was caught and rolled between those cars, did you; did you go to where he was when he fell?
A. Yes, sir.
Q. After he had been rolled between these cars until he got to the end of the stationary car he fell on the deck of the barge?
A. I don't know when he fell or how. I did not see him fall.
Q. He was on the barge, down on the floor, when you saw him?
A. Yes, sir, when I next saw him.
Q. What became of him after that?
A. They taken him up and put him aboard the tugboat
168 and sent him to the hospital.
Q. Do you know what injuries he received?
A. No, sir.

Cross-examination.

By Judge WILLCOX:

Q. As I understand it, you and Mr. Baugham were both brakemen in the service of the company, on this car, the day this accident happened?
A. Yes, sir.
Q. Who was the conductor, the man in charge of the movement of the cars?

A. Captain F. E. White.

Q. I understood you were at the end of the cars next to the engine?

A. Yes, sir.

Q. The cars are shoved on the barge by the engine?

A. Yes, sir.

Q. Mr. Baugham was up to the other end of the cars, was he not?

A. Yes, sir.

Q. As I understand it, your duty was to signal from your end of the train?

A. Yes, sir.

Q. Mr. Baugham set the brakes on the cars left on the barge?

169 A. Yes, sir.

Q. You say you had shoved on the two tracks, on the right hand side, and pulled off, and made up a train of how many cars, do you remember?

A. Fourteen.

Q. They would be put on the two left hand tracks?

A. Yes, sir.

Q. You shoved down how many on the furthest track to the left?

A. Yes, sir.

Q. You said, in your direct testimony they were cut off there, and pulled out, and you left Mr. Baugham on the track. Was he on the car or on the track?

A. On the car, on the left hand track.

Q. He had not gotten down from the car when you last saw him?

A. No, sir.

By the COURT: Barge or car?

By Judge WILLCOX:

Q. That was the left hand outside track?

By the COURT: Last track.

By Judge WILLCOX:

Q. He was on the car which had been left standing on the track. They shoved 14 cars down, cut off six, and left Mr. Baugham standing on the southern track with the six cars on the left hand

170 side of the barge; is not that it?

A. Yes, sir.

Q. The engine then pulled eight cars back on the shore?

A. Yes, sir.

Q. Then they were shoved on the middle track on the left hand side?

A. Yes, sir.

Q. Now, you did not see Mr. Baugham, as I understand it, any more after you saw him standing on the car, until you saw his head coming up on the other side of the cars that were shoving in?

A. That is right.

Q. In some way he had gotten down from the car, on the West

track, and crossed over the next track to the end which is the West middle track, and had gotten between the two middle tracks?

A. Yes, sir.

Q. And was climbing up the side of the car?

A. Yes, sir.

Q. Could you tell, when you first saw him, whether he was being pinched at that time, or not?

A. He was not pinched at the time.

Q. Did you hear him holler?

A. No, sir.

171 Q. You did not hear him holler at all?

A. No, sir.

Q. You did give the signal to stop?

A. Yes, sir.

Q. Why did you give the signal to stop?

A. The tracks was coming together, and I gave the signal.

Q. You knew he was bound to be pinched?

A. Yes, sir.

Q. As soon as the car he was on had come so as to get to the car on the other side of the middle track it was bound to catch him?

A. Yes, sir.

By the COURT: Which end of the car did he occupy?

By Judge WILLCOX:

Q. Was he right there on the end of the car from you?

A. Yes, sir, north end.

Q. You were asked about the ladder being there for the purpose of the brakeman to climb upon the car?

A. Yes, sir.

Q. Was there any necessity for Mr. Baugham to climb up on that car in that service?

Mr. PETERSON: I object. That is a matter of opinion.

172 By Judge WILLCOX: My friend asked the witness if the ladder was not there.

Mr. PETERSON: I withdraw the objection.

By Judge WILLCOX:

Q. When you said the ladder was there for the purpose of the brakeman to climb up, did you mean to say it was Mr. Baugham's duty to climb up at that time?

A. No, sir.

Q. Did you ever climb up in that way?

A. No, sir.

Mr. PETERSON: I object.

By Judge WILLCOX:

Q. Did you ever see any other brakeman climb up that way?

A. No, sir.

Q. Did they have any duties to perform on the barge to make them climb up between the cars?

A. No, sir.

Redirect examination.

By Mr. BUFORD:

Q. I understand, now, that before Mr. Baugham was hurt you had placed the cars on the two tracks on the East side of the center line of the barge?

173 A. Yes, sir.

Q. You then took the signal, and shoved in fourteen cars—there were no cars standing on the two western tracks on the barge?

A. No, sir.

Q. You then shoved in fourteen cars on the outside track, the extreme western track?

A. Yes, sir.

Q. Then you cut loose from those, and took the engine, leaving six?

A. Yes, sir.

Q. Leaving six on the extreme western track?

A. Yes, sir.

Q. You cut loose from the six, with the engine and eight cars attached, and pulled those out on the land?

A. Yes, sir.

Q. On the shore to get to the switch?

A. Yes, sir.

Q. To come back on the left hand center track?

A. Yes, sir.

Q. The last time you saw Mr. Baugham he was on one of the cars left?

A. Yes, sir.

Q. Before you saw him climbing on this car?

A. Yes, sir.

Q. Was not all he had to do, when he got there, all he had

174 to do was to cross the center track and be in position to climb on the car when you pushed it in?

A. Yes, sir. He could step across here.

Q. To get in the position from which he commenced to climb the car, all he had to do was to cross from the western track, from the car he was on, get down, get on the barge, walk across the western center track, and be in position to do this climbing, as to whether he ought to have done it is not the question. There was no car to prevent him crossing over?

A. No, sir.

Q. Well, now, he had to be on top of the incoming car to apply the brakes, didn't he?

A. Yes, sir.

Q. Which one of these cars was he getting on when he was caught?

A. On the leading car.

Q. The first car?

A. Yes, sir.

Q. You were then—that means the end car?

A. The leading car.
Q. You were on the car next to the engine?
A. Yes, sir.
Q. That put six cars between you and him?
A. Eight or nine cars. Fourteen cars on the barge and
175 we had eight or nine.
Q. You say you left six over there?
A. Yes, sir.
Q. Don't six from fourteen leave eight?
A. Yes, sir.
Q. Why are you commencing to get doubtful whether it was eight or nine?
A. We keep the car from pushing.
Q. You might have had another car?
A. Yes, sir.
Q. That would not have made 7 cars between you and him?
A. Yes, sir.
Q. You were six or seven car lengths from him?
A. Yes, sir.
Q. Was not the end car the one he ought to have gotten on?
A. Yes, sir.
Q. It was the one he had to be on to apply the brakes?
A. Yes, sir.
Q. What other way was there for him to get on the car except to climb upon it?
A. At that time?
Q. Yes?
A. Stand on the side track and step over when the moving car came along.
176 Q. How?
A. Standing on the stationary car, and step on the moving car as it passed.
By Judge WILLCOX: Step from the stationary car to the moving car as it passed.
By the COURT: Was the ladder on the side of the car or end?
A. On the side of the car. It was on the side. He was climbing on the side of the car. It was on the side. He was climbing on the side of the car.

(By Mr. BUFORD:)

Q. What I want to ask you, according to what you have just said it would be your idea of what he ought to have done, was to remain on the standing car on the extreme left track until the rest were shoved in, and while in motion step across the space between the center track and the outside track?
A. Yes, sir.
Q. How far would he have to step?
A. I don't know, sir, exactly. It is not very far. It is a short distance. A man can step across there easy.

Recross-examination.

By Judge WILLCOX:

Q. When you started to cut the cars off on the other side, did Mr. Baugham get down from the standing car and climb up on the moving car, or step from the standing car to the moving car?

177 A. He stepped from the standing car to the moving car.

Q. Is that the way you always do?

A. Yes, sir.

By Mr. BUFORD:

Q. How do you know that?

A. Well that is the way we generally do.

Q. How do you know he did it?

A. I didn't say he did that. I didn't say he always did.

Q. How do you know Mr. Baugham did ever step across the cars at all?

A. I was looking at him when he stepped across.

Q. When?

A. The 29th and 30th when we shoved on the east track of barge 14.

Q. What occasion had you to look when he was doing it?

A. My business to look at him.

Q. Was it your business to tell him how to do?

A. No, sir.

Q. You did not tell him how to do?

A. Not particular.

Q. You did not tell him anything as to how to perform the duties?

A. No, sir.

178 C. C. WALLER, being duly sworn, on behalf of the defendant, testified as follows:

Judge WILLCOX: I want to put Mr. Waller on so that we can prove these photographs.

Q. What is your name?

A. Clarence C. Waller.

Q. You are the head of the Claim Department of the defendant Company?

A. Yes, sir.

Q. After this accident happened did you come to Norfolk in reference to it?

A. Yes, sir.

Q. Did you have these photographs taken by H. H. Hunt, of the firm of Freeman & Hunt?

A. Yes, sir.

Q. Did you superintend the placing of the cars and barge?

A. I did, with the assistance of Mr. White.

Q. The conductor?

A. Yes, sir.

Q. Was he the same Mr. White who was the conductor at the time the accident occurred?

A. He was.

Q. Were the photographs taken to show the position of the cars in the various stages of the loading of the cars on the morning of the accident, as indicated by Captain White?

179 A. Yes, sir.

Q. You know nothing about that of your own knowledge?

A. No, sir.

Q. These were taken on the 13th of January?

A. I don't remember the date.

Q. Had there been any change whatever in the location of the tracks on the barge between the date of the accident and the date of the photographs?

A. It was my understanding there was no change.

Q. You don't know of your own knowledge?

A. No, sir.

NOTE.—The photographs just referred to are filed marked exhibit 1, 2, 3 and 4.

Captain E. S. JOHNSON, being duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. BUFORD:

Q. Captain, you are the captain, I believe, of Barge No. 14?

A. Yes, sir.

Q. On which Mr. Baugham received the fatal injury?

A. Yes, sir.

180 Q. On December 30th, 1912?

A. Yes, sir.

Q. Will you tell the court and jury please, Captain, all the facts you know about it?

A. On this morning I went out from the office with my bills going down to my barge No. 14 in question, and they were shoving on the last track, the last center westward track, and I had my overcoat on my arm, and the bills in my hand, and it was going along down so nicely, the draft was, so I thought I would take a ride down, and I crawled up on the car, on the side of the car by the grab iron, and I had my overcoat in my hand, and when I got up on the top, about on the car, about the time I met Mr. White, which is the conductor of that train, and I saw a man's head and shoulders come up above the car on the center track, in between the center track about this far (indicating). He had hold of the grab iron, and about the time I saw him I said to Mr. White "Look there." He turned around, turned around, and began to give the signals, and the cars came together upon this man and rolled him around, and he fell, and they stopped the car then, and that is about all I know.

Q. Did you know who the man was?

A. At that time?

Q. Yes.

A. No, sir.

181 Q. You knew the other train men working on the barge?

A. I knew Mr. White and the colored man on the south end.

Q. This man George Harris?

A. Yes, sir.

Q. Was the tide high or low?

A. The tide was low, reasonably low.

Q. That made the tracks inclined, the way the train was being moved?

A. Yes, sir.

Q. Towards the barge?

A. Yes, sir.

Q. And it was moving down so nicely you concluded you would get on.

A. It was going very slow, the train, and I climbed up on it.

Q. Which end did you climb up on?

A. I climbed up on the south end of the car.

Q. The south end of the car?

A. Yes, sir.

Q. Which car?

A. The third car from the end.

Q. The third car?

A. Yes, sir, the third car.

Q. Did you say that you called the attention of Capt. White?

A. Yes, sir.

182 Q. Conductor White was on?

A. Yes, sir.

Q. You were on the same car Mr. Baugham was climbing on?

A. No, sir.

Q. How many cars, so far as you can tell?

A. I would not like to say. I think the second car away.

Q. I imagine it would be hard to say?

A. Yes, sir.

Q. Now, on the opposite side from where he was climbing was there, or not, enough room for him to have climbed up in safety?

A. On the opposite side, if he had climbed up on the side, climbed up on there, there would be plenty of room.

Q. If he had climbed up on the left side?

A. On the west side.

Q. That is the left side as we are *are* speaking of it here?

A. Yes, sir.

Q. And there was plenty of room over that side?

A. Yes, sir.

Q. Now, Captain, let me refresh your memory as nearly as I can. You testified before the Coroner's Jury in this matter, did you not?

A. Yes, sir.

183 Q. Do you recall this question being put to you by the coroner: "Was this brakeman, who was injured, trying to

get up on the same car that you were on?" Do you recall that question being put to you?

A. I think it was, but I think we had some difference of opinion about that.

Q. Do you recall, on that occasion, that you made this answer: "I think it might have been. It was either the car I was *or on* the next car?"

A. That might be possible.

Q. So that it is right hard for you to tell accurately now how these various things were?

A. Which car he was on.

Q. Did you have any thing to do with the brakeman in the operation, of transferring those cars from the land to the barge?

A. Not a thing in the world, sir.

Q. You are a navigator?

A. I am the captain of the barge.

Q. You did not know this young man, and, therefore, had never given him any instructions?

A. I don't have anything to do with those cars at all.

Q. How wide are these two tracks? That is the two center
184 tracks apart, from inside rail to inside rail?

A. The two center tracks?

Q. As they come on the barge?

A. They vary. It depends on the cars. Some are wider than others.

Q. I am talking about the tracks?

By Judge WILLCOX: Between.

A. I don't know, sir.

By Mr. BUFORD:

Q. You don't know?

A. No, sir.

Q. Do you know the width between those rails, as to where they enter the barge, when they approach each other most nearly?

A. No, sir, I don't know anything about that.

Q. How long have you been operating that barge?

A. That one particular barge?

Q. Yes.

A. Two years. The first day of last August. I have been in the company seven years. I went to work for the company in 1907, the 26th day of April, on the barge.

Q. With all of that experience in the service, as the captain of that barge, you cannot tell the jury now the distance between those tracks?

A. No, sir.

185 Q. Not even approximately?

A. No, sir, I don't have anything to do with that.

Q. Whether between the center tracks, where they commence to converge, to the place they reach greatest proximity, or between the center track and the outside track?

A. No, sir, I don't know at all.

Q. When the tracks approach most nearly to each other, the two center tracks, how close would the roofs of the cars come?

A. Sometimes they come together. If a very wide top on the car sometimes I have known them to knock up together. They vary.

By the COURT:

Q. Do you mean by that sometimes, on account of the varying width, of the cars, that they side-swipe each other?

A. Yes, sir.

By Mr. BUFORD:

Q. The side of the car or roof?

A. The roof.

Q. It would actually come together in some places?

A. Yes, sir.

Q. Sometimes where cars were not so wide, that would not happen?

A. No, sir.

186 Q. I understood you could not tell the width of the car. I mean the width of the tracks at the edge of the barge, and are you able to tell how far apart the cars on those tracks are at the edge of the barge?

By Judge WILLCOX: You mean the end of the barge?

By Mr. BUFORD:

Q. Would be from each end?

A. I have never measured that, or anything like that.

Q. But pleanty of room for a man to climb up in safety?

A. Yes, sir.

Q. That condition continues for some distance down the barge?

A. Some little distance, yes, sir.

Q. Beyond the flag pole?

A. Oh, yes, sir.

Cross-examination.

By Judge WILLCOX:

Q. Do you know when barge 14 was built?

A. No, sir.

Q. Was she in the service of the company before you went on her?

A. Oh, yes. I think she is seven or eight years old. I

187 won't be positive.

Q. You had been on her how long?

A. Two years first day of last August.

Q. Are you a navigator?

A. Yes, sir.

Q. You have nothing to do with the loading of the boat at Port Norfolk or at Cape Charles?

A. No, sir, I have nothing to do with the loading.

Q. You have nothing to do with the rails of that barge?
A. No, sir.
Q. Amidship- that barge is not the power-house located?
A. Yes, sir.
Q. Is not that required to be above the roof of the car?
A. Yes, sir.
Q. How is that supported?
A. By four iron stanchions, heavy iron stanchions set well.
Q. Are those stanchions located between the inner rail of the outside track and the inner rail of the inside track on both sides?
A. Yes, sir.

188 Q. And at that point the distance between the outer track and the middle track is greater, and the distance between the inner rails of the two inside tracks is less?

A. Yes, sir.
Q. On account of putting room for the stanchions?
A. Yes, sir.
Q. Could you put it any other way?
A. No, sir.
Q. The flag pole is about twenty feet from the stern of the barge?
A. About 20 feet, I should say.
Q. At that point the distance between the inner rails is greater than it is where the house is located?
A. Yes, sir.
Q. But even at that point if anybody is up on that car, can they pass that flag pole in safety?
A. No, sir.
Q. If anybody would get up on the inside car, at the end of the barge, and attempt to ride by that flag pole, they would be caught by the flag pole?
A. Yes, sir.
Q. Do you know any instance in which those cars have struck the flag pole and knocked it down?

189 A. Often do that. We carry halyards on the flag pole, and they have to be particular to wrap them around the pole.

Q. You say the cars were passing so slowly that you got up on the cars?
A. Yes, sir.
Q. You got up on the third car?
A. I think the third car on the north end.
Q. You don't know whether you saw Mr. Baugham getting up on that car or the one next to it?
A. No, sir.
Q. Was it propable he might have been on the end car?
A. It might be possible.
Q. You were not paying particular attention to him until you saw him?
A. I saw Mr. Baugham standing on this off shore track, the last I saw him.
Q. On the car?

A. Yes, sir.
Q. You never saw him down on the barge deck?
A. No, sir. I saw him on the off shore car.
Q. The next time you saw him was on the other side of the
190 cars on which you were riding?
A. On the track.
Q. You saw him on the car?
A. Yes, sir.
Q. You never did see him on the track?
A. No, sir.
Q. Why did you cry out when you first saw him?
A. I thought it was an unusual place for a man to be. I didn't suppose any man had any business there.
Q. Had you ever seen any other brakeman do that?
A. No, sir, I knew there was something wrong climbing up on that side.
Q. You said there was plenty of room on the side away from him to climb up on the car, if he had wanted to climb up?
A. Yes, sir.
Q. No trouble on that side?
A. No, sir.

Redirect examination.

By Mr. BUFORD:

Q. Well, you saw that the man was caught—you saw the man while he was between the cars, and as I understood you, he
191 was caught when you saw him?
A. Yes, sir, he got up this far, his body, and he was caught there.
Q. When you saw him?
A. Yes, sir.
Q. And you at once called out, because you knew there was a man caught between those cars?
A. Yes, sir.
Q. What do you say has been your occupation?
A. Captain of a barge.
Q. Before you became captain of the barge?
A. Well, I was with Captain Cason, working on his barge.
Q. In what capacity?
By JUDGE WILLCOX: He has always been a seaman.

By Mr. BUFORD:

Q. You have not been a constructor of barges?
A. No, sir.
Q. You don't know the width and length of the barge?
A. Only from the papers, I look over the papers sometimes.
Q. You would not know how to build a barge?
A. I don't know that I would.
Q. You have no engineering expert knowledge as to how a
192 barge ought to be built, or how it should be constructed?
A. No, sir, I don't know that I do.

Q. You do know how to run them after somebody else builds them?

A. Yes, sir, when some one keeps the tracks up. I have a boss man to look after the tracks.

Q. You cannot tell the jury at all that this structure, I believe you call it a bridge, has to be supported by these uprights, placed at the particular position that these uprights were placed?

A. They have got to be placed there if anywhere. There is no other place to put them.

Q. What I mean is this, you don't mean to tell the jury that the barge could not have been so constructed as to be made a little wider?

A. I think they are pretty wide enough, for the place they have to be. I don't think they can make them much wider; if they do they will have to make more room for landing them.

Q. You could not get in the dock?

A. No, sir.

Q. What would be the trouble of getting her in the dock if you open it two feet?

A. I suppose they could do that.

193 Q. What I want to know is this; you are not such an engineer, or such an expert on construction as to be able to tell the jury that a barge could have been made two feet wider, and still not be an all right barge?

A. No, I would not like to tell the jury because I don't know. I would not like to tell the jury that the barge could not be made two feet wider without ruining them.

Q. You have no expert knowledge on that subject?

A. No, sir.

Q. The only thing that occurs to you is, if they made it two feet wider it would not—they would have to make the dock two feet wider?

A. I suppose they would.

Q. That means to drive some piles?

A. That would mean a whole lot.

Q. You know that human life means a whole lot?

A. Yes, sir.

Q. That is something as you go along?

A. Yes, sir.

Q. It would just be taking up some piles here and widening the landing place out, and doing what ever was necessary to make that dock two feet more width for the barge?

A. Yes, sir.

Q. That is all?

A. Yes, sir.

194 Q. You have no knowledge, no expert knowledge, now as a builder of a barge, to enable you to say there could have been some other arrangement of these pedestals?

By Mr. PETERSON: Stanchions he calls them.

Q. These stanchions?

A. I don't see where they could put them. I can't see where they could put them. It might be but I can't see it.

Recross-examination.

By Judge WILLCOX:

Q. Can you tell us which one of the cars that was standing still caught Mr. Baugham; was it the first car you got to, or the next one?
A. I think the second one standing still.
Q. The second car standing still?
A. Yes, sir.
By the COURT: On the south side?

By Judge WILLCOX:

Q. The cars on the middle track, he was caught between the cars on the two middle tracks?
A. Yes, sir.
Q. You think it was the second car on the east middle track from the southern end?
195 A. Yes, sir.

By Mr. BUFORD:

Q. Where did you first commence to climb on that car, on the shore, or on the barge?
A. Where did I commence to crawl up on the shore.
Q. How far from the barge?
A. Why, I suppose it was about—I don't know the length, and I guess it was about a car length from the bridge. I suppose the bridge is seventy or eighty feet long.
Q. You had gotten on the car before it got on the barge?
A. Yes, sir.

By Judge WILLCOX: May I ask a question here while you wait?
By Mr. BUFORD: Yes, sir.

By Judge WILLCOX:

Q. The danger of getting up between the inside track- is apparent to anybody that looks at it?

Mr. PETERSON: I object to that. That is a question for the jury, and I call your Honor's attention to the suggestion.
The COURT: Let him describe the physical condition. Strike that out.

196 By Judge WILLCOX:

Q. Would you have gotten up on the side of that car?

Mr. BUFORD: I object to that.
The COURT: I don't think that is a material question.
Judge WILLCOX: Your Honor strikes it out.
The COURT: Yes, sir.
Judge WILLCOX: I note an exception.

The COURT: I think the rule is what an ordinary person would do under ordinary conditions.

By Judge WILLCOX:

Q. Would any man of ordinary intelligence, seeing the situation as it was, when Mr. Baugham was there, have attempted to climb up there at the time when the young man did.

Mr. BUFORD: Objected to.

NOTE.—Objection was sustained *to*, and an obpection noted.

Captain F. E. WHITE, being duly sworn on behalf of the plaintiff, testified as follows:

Examined by Mr. BUFORD:

Q. What position did you hold on December 30, 1912, when Richard T. Baugham received the fatal injury on barge 14 of the N. Y. P. & N.

197 A. Conductor of the train.

Q. Conductor of the train he was on?

A. Yes, sir.

Q. Did you give him any instructions as to what dangers would arise from the services to be performed by him?

A. Well, no, I didn't exactly on account of he had been working the day before. I generally give the instructions the first day.

Q. So you did not give him any?

A. Only the working of the barge, after I started to work the barge I gave instructions from the barge.

Q. Instruct what to do, not what dangers to avoid, but what to do as a brakeman?

A. Yes, sir.

By Judge WILLCOX: You are drawing a distinction between telling him how to do, or showing him how to do?

By Mr. BUFORD: Yes.

By Mr. BUFORD:

Q. You did not, on that occasion, in running the barge give him any kind of instructions as to what the dangers were, but told him what you wanted done?

198 A. I told him what I wanted done.

Judge WILLCOX: Ask the captain to tell what he did tell him, not what he didn't tell him.

Mr. BUFORD: I would, myself, prefer to ask him if he instructed him as to the dangers, and you can ask any questions that you want.

Judge WILLCOX: Go ahead.

By Mr. BUFORD:

Q. So, then, I understand you to say you did not give him any warning as to the dangers he might encounter in performing the duties which you called on him to perform as brakeman?

A. Yes, sir.

Cross-examination.

By Judge WILLCOX:

Q. What were you doing that day?
A. I was working the barge at the time.
Q. What position?
A. Conductor.
Q. When you speak of "working the barge," that conveys as much idea to the gentlemen there as when you say working potatoes?
A. That is right.
199 Q. What do you mean by working the barge?
A. Taking the cars from the barge, and putting them on the barge.
Q. Who were your brakemen?
A. Mr. Baugham and Harris.
Q. Where was Harris' place to be on that train?
A. On the head car next to the engine.
Q. It was on the shore there?
A. Yes, sir.
Q. Where was Mr. Baugham's place?
A. On the leading car on the barge.
Q. Did Mr. Baugham work with you the day before?
A. No, sir.
Q. You don't know what he did the day before?
A. No, sir.
Q. You don't know where he worked the day before?
A. No, sir.
Q. What time did he go to work the morning he was hurt?
A. Six thirty.
Q. Was he with you then?
A. Not exactly when I first come out, but he got down there about fifteen or twenty minutes late.
200 Q. What was the first thing you did in loading a barge after he came down? Was this the first barge you and he had worked together?
A. Yes, sir, the first.
Q. Was it the first work you did on this barge?
A. Yes, sir.
Q. You unloaded it first?
A. Yes, sir.
Q. How many cars?
A. 28.
Q. You pulled those off?
A. One side off.
Q. Which side did you pull first?
A. The east side.
Q. Then what did you have to do—load the east side before you pulled for the west?
A. Yes, sir, loaded the east side before pulling the west.
Q. Did he work on that work?
A. Oh, yes.

Q. Now, how—what did he have to do?
A. He had to stay up on top and pass the signals to the head men.
201 Q. How many cars did you have down in the first cut on the east side?
A. I had 14 cars.
Q. Where was he, on the north end of the car.
A. On the leading car, north car.
Q. After you shoved your cars on the barge how many were left on the east track?
A. Six cars.
Q. You cut off, and pulled out, and pulled back on the shore?
A. Yes, sir, pulled back to the shore.
Q. Where was Mr. Baugham at that time?
A. On the head car, on the south end.
Q. Wasn't it his duty to fix the brakes on those six cars?
A. Only put the brake on the leading car, and make his way back to the sixth car.
Q. He remained on the leading car until you shoved the six cars back?
A. Until the first car got to him, and he stepped across on the leading car of the center track.
Q. Please state to the jury whether or not that is the usual and proper mode for getting from the cars on the outside back
202 to the cars on the middle track for the purpose of placing the cars on the middle track?
A. That is the general rule.

By Mr. BUFORD:

Q. What rule?
A. Not any written rule, but the rule in the service. Our instructions when we go to work a barge, we remain on top. We don't have any occasion to get down, but we step from one on to the other.
Q. Did you tell Mr. Baugham that?
A. Yes, sir.
Q. You showed him how?
A. I showed him how to step across. I followed him back with the leading car, and told him to always come on the head car, and step on the other car coming in.
Q. Was there any reason for him to get down on the deck of the barge at all?
A. Not at all.
Q. Stepping from one to the other was that a reasonable *say* way to do it?
A. Perfectly safe.
203 Q. You so instructed him?
A. Yes.
Q. Did he have any thing to cause him to get down on the deck of the barge?
A. No, sir.

Q. Did he have to count the cars off.
A. No, sir.
Q. His sole duty was looking after the brakes on the car.
A. Yes, sir.
Q. You told him that?
A. Yes, sir.
Q. After you placed the cars on the two east tracks, you unloaded the two west tracks?
A. Yes, sir.
Q. You made up a train of fourteen cars to put on the two west tracks?
A. Yes, sir.
Q. Were you on the cars or on the ground?
A. Me?
Q. Yes.
A. Shoving.
Q. Were you up on the cars—you are the conductor, are you not?
A. Yes, sir.

204 Q. You had to stand somewhere when the cars were being shoved; were you on the cars, or up on the barge, or up on top of the car?

A. On the bridge on the west side track.
Q. You mean the bridge that connects the land with the barge?
A. Yes, sir, I was not upon the bridge when loading. I was going back.
Q. When you shove the cars on the west side track who gives the signals to cut off?
A. I gave it.
Q. Where was Mr. Baugham when the car people——
A. On the south car on the west side track.
Q. What did you do with the eight cars?
A. I set the switch and started on the center track on the west side.
Q. Now, I will show you photograph No. 2. Look at the picture now, just there, and show—you left the cars on the west track, after leaving six cars there?
A. Yes, sir.
Q. You were standing on the float, near the middle line of the float?
A. Yes, sir.
Q. This picture now represents the six cars all left on the west track?

A. Yes, sir.

205 Q. You threw the switch, so as to, after they had pulled the eight cars back on the shore, you threw the switch, as indicated here on this plat so as to leave the next draft of cars go on the middle track on the west middle line of the barge?

A. Yes, sir.
Q. When those cars were cut off and you went ashore, where did you say Baugham was?
A. On this car. (Indicating.)

Q. Did you ever see him get down off of that car?
A. No, sir.
Q. After you gave the signal for the cars to be shoved on the middle track?
A. Yes, sir.
Q. Did you see Mr. Baugham?
A. Not after I threw the switch.
Q. When did you next see him?
A. The captain of the barge saw him before I did.
Q. At that time where were you, between the two middle tracks, or between the first track, the track on the west?
A. I was on top.
206 Q. After you cut off the eight cars and took them ashore, you got up on top of the car?
A. Yes, sir.
Q. As it was backing on the barge Captain Johnson, of the barge, called your attention?
A. Yes, sir.
Q. What did you see then; when he called your attention, did you see?
A. Yes, sir.
Q. Where was he?
A. Between those cars there. (Indicating.)
Q. Look at number three, which shows the cars on the east track and also the car on the west middle track; you were on top of the cars on the west middle track?
A. Yes, sir.
Q. You see the flag pole there at that point, don't you?
A. Yes, sir.
Q. Well, was Mr. Baugham on the other side of the flag pole, as you saw him?
A. Yes, sir.
Q. Had the north end of the cars you where shoving gotten
207 to the south end of the middle track when you saw him?
A. Yes, sir.
Q. Between what cars was he when you saw him?
A. On the leading car, and I was on the end car.
Q. The north end car of the barge, and he was caught between that second car standing on the middle track?
A. Yes, sir.
Q. At that time how much of his body was above the car?
A. Just his head and one arm.
Q. Did you hear him call out at all?
A. Not until after the Captain of the barge called my attention.
Q. Do you know whether or not he was struck of caught by the first car standing still?
A. I don't know.
Q. You don't know?
A. No, sir, I don't know.
Q. Was there any reason for Mr. Baugham to get down from

the standing car, and cross the left hand middle track and go up on the inside to the moving car?

A. No, sir.

Q. Did his duty require him to do that?

208 A. No, sir.

Q. Was the distance between those cars, after they passed the flag staff, so close as to suggest danger to any one who attempted to get up?

A. Yes, sir.

Q. Any man of ordinary prudence would have seen the danger of attemption to get up on these cars when they moved?

A. Yes, sir.

Mr. BUFORD: I object to the last question.

The COURT: I think the true rule is to let the witness tell the physical facts, and it may be competent for the court to determine whether it was negligence per se.

By Judge WILLCOX:

Q. I understood you to say, after you passed the flag pole, the distance between the cars was so close no one could get up without injury?

A. Yes, sir.

Judge WILLCOX: To the other question I want to note an exception, if your Honor please.

Redirect examination.

By Mr. BUFORD:

209 Q. Do you definitely recall now having warned, or having told Baugam to walk from one car to the other without coming to the ground?

A. Yes, sir, I told him when he was on top to step from one car to the other and not to get down, that there was no necessity for him to do it, but to stay on top to pass signals.

Q. You told him that it was necessary for him to stay on top to pass signals?

A. Yes, sir.

Q. Is not that about all you did tell him?

A. I told him how to get around on the barge, the places to be to pass signals, and also rode with him back on the center tracks, and instructed about the distance each end of the barge to give the signals, and such as that. The conductor never rides the rear of the train back, only with a new man, and I went back with him on the center track.

Q. He was a new man, was he?

A. A new man.

Q. That was the first day you ever worked with him?

A. Yes, sir.

Q. Did you know him before that?

A. Oh, yes.

210 Q. You knew him to be a young man here in Port Norfolk?

A. I had been knowing him quite a while.

Q. Without any railroad experience?

A. I did not know whether he had any railroad experience.

Q. You are bound to have known it if you knew him quite a while?

A. I did not know what occupation he held. I saw him around Port Norfolk.

Q. He did not dress like a railroad man, did he?

A. No.

Q. He did not look like a railroad man, did he?

A. Well, you cannot really judge a person by that, as to whether he is a railroad man or not.

Q. You mean because the white men wore, more or less, the same kind of working clothing——

A. A man don't——

Q. A man may wear some other clothing, but is not it a rule—won't you be willing to say to the jury you were perfectly well satisfied that before the work that Mr. Baugham did that day, he had never had any experience in working railroad?

A. No, sir, I don't say. I don't know what kind of employment he had.

211 Q. You saw the young man more or less how long in Port Norfolk?

A. I have been seeing him around Port Norfolk. I knew he did clerk in the drug store, and after he left the drug store I could not say what he did.

Q. Did you know that he worked as a carpenter?

A. No, sir, I did not.

Q. With all that knowledge you are not quite willing to tell the jury you feel morally satisfied he was a new man?

A. He was a new man on the yard.

Q. Well, now, Captain, you were examined as a witness before the coroner's inquest, were you not?

A. Yes, sir.

Q. Do you recall telling the jury on that occasion, anything about instructing or warning this young man?

A. No more than what I have told you here.

Q. What you have told here to-day?

A. Yes, sir.

Q. Let me read you this:

Judge WILLCOX: Was he asked anything about that at the coroner's jury?

212 Mr. BUFORD: I was looking to see.

Q. Were not you there, Captain, during the whole of the coroner's inquest?

A. Yes, sir.

Q. Did not you hear the jury putting the questions to the witnesses, as to whether this boy was instructed?

Judge WILLCOX: I object to it. How could he state anything about what was asked at the inquest?

Mr. BUFORD: We are testing his recollection. I want to show it was the subject of inquiry. I cannot say positively, but I will call attention to his answer, and it seems to me he is mistaken when he says as to the statements he made before the coroner's jury that they are the same as now. In asking this question, if it was not the subject of inquiry by the jury, I do that for purpose of showing that if Mr. White had given that character of instruction, he would have at once told it to the coroner's jury.

Judge WILLCOX: I have no objection to my friend's asking this witness what he said at the coroner's inquest, and tell what the questions were, and if he made a different statement, but I cannot see what this witness had to do with some question asked somebody else. It was not asked him.

213 Mr. PETERSON: I want to suggest to the court that Mr. Buford propounded this question to the witness. He asked the witness if he did not make the same statement about this warning, and instructions as to the duty as he had made here.

NOTE.—The question is read.

Judge WILLCOX: I don't object to his proving what he said at the coroner's inquest if it is different from here.

Mr. BUFORD: We will waive that now, and will go on with the witness.

Q. Were not you asked this question:

"Q. Tell what you know about the injury to Mr. Baugham?

A. Well, I went down to load the barge that morning, and I staid on the barge, and he being a new man, of course, I always ride the rear of the center track back with him, he being a new man. There are lots of times that we cannot get the required quantity on the center track, a new man, not being acquainted with the work, and, of course, I don't like to trust a new man back there, as they have a very small space, and sometimes I know, of the center track—he had loaded and unloaded one center, and I went with him back to the other, and we unloaded the other center, and I went on the yard with him, and I showed him how to take the slack on

214 the cars to see that they are all coupled before shoving on the barge. Of course, it is not necessary to ride the center track back. The center is open, and on the side track the cars don't come within a car length of the end of the barge, and I did not go back with them to the side track, and the bridge man cut off the side track, and after he cut off and started off the barge, coming back on this side, this side of the house, and he was standing on top when I saw him, when we went through the sheds.

Q. You mean the man that was injured?

A. Yes, sir, he was on the headmost car, going through the switch, and the tide was very low, and of course I didn't notice back there any more. I took it for granted he was standing up there and waiting for the car to come, so he could step across, it is only a small space, and I caught this car as soon as I seen the switch,

and signed the engineer ahead, and I got up on top, and started back to the second, and there was not anything going on, and I was making my way to the third place, and about that time I met Captain Johnson, the captain of the barge, and about the time I met Captain Johnson I saw my front man sign down, and it drew my attention, and I looked towards the front man, and down the train, and I did not see anything wrong, and about that time
215 Captain Johnson said 'Look, look,' and I heard Mr. Baugham holler at that time, and he was caught between the eaves of the cars, and rolled between the cars. As soon as I saw him I commenced to sign down, and about the time he stopped, why, he had gotten to the end of the car, the standing car, and then he rolled to the deck.

Q. The last time you saw him before you saw him between the cars he was standing on the running car?

A. He was standing on the car. It was standing still on the side-track. I threw the switch, and did not look back any more, because I saw him up there, and I took it for granted that he would stay up there, and step across as it came by.

Q. Don't you think that is what he did try to do?"

By Judge WILLCOX: Read what he said.

Mr. BUFORD: I don't want to commit myself to anything inadmissable. I think some of it is inadmissable.

By Mr. BUFORD:

"Q. Don't you think that is what he tried to do?

A. After I threw the switch and started the car, instead of staying up there he got down and crossed between the two center tracks."

216 By Judge WILLCOX: I will admit it was simply a matter of inference.

By Mr. BUFORD:

Q. You think he got down and crossed that track, but you don't know?

A. I don't know how he got down.

By Mr. BUFORD: "By the jury:

Q. Did he make any statement to you at all of how the accident happened?

A. I cannot say that he did.

Q. Is there any man here that he made a statement to relative to the accident?

A. I don't know.

By Judge WILLCOX:

Q. When you were about to have the cars shoved on the center track, on the left hand side, the brakeman who was killed was standing at that time on the end car, on the side track, which was stationary?

A. Yes, sir, when I pulled off to the side.

Q. You expected him to step from that car to the moving car as it passed him?

217 A. Yes, sir.

Q. Instead of that when you next saw him he had evidently gotten off the car and passed over the lefthand center track and gotten up on the left side of the moving car?

A. Yes, sir.

Q. And you saw his head over the eaves of the car?

A. Yes, sir.

Q. You did not see him when he got down, yet you assume that from where you subsequently saw him?

A. Yes, sir.

By Mr. BAUGHAM:

Q. Where they were standing, the cars, they were not in the clear, enough to clear a man, were they?

A. While they were on the center track. They will clear the top of a car, but they would not clear a man. Of course from that track to the other track they would clear a man, but he had evidently gotten down.

Q. And crossed between the two center tracks?

Judge WILLCOX:

Q. Could he have gotten down on the center track and

218 gotten up on the moving car in safety?

A. No, sir.

Q. You cannot get up on either side with safety?

A. If he had been a little quick.

Q. It is not a safe thing to do?

A. No, sir.

Judge WILLCOX: He was not asked the direct question as to whether he gave instruction or not.

Mr. BUFORD: No.

By Mr. BUFORD: I don't think he was asked that.

Judge WILLCOX: Not at the Coroner's inquest, no.

By Mr. BUFORD:

Q. You were asked if Mr. Baugham's duty required him to get upon the car; what was your answer to that?

By Judge WILLCOX: State that question as it is. State the question as to whether his duty required him to get on the moving car on the side that he did. What would be your answer to that?

A. It was not his duty to get up on the car where he got up at. His duty was to stay on top. He got on top right out in the yard, and did not have no occasion to get down after he got on top

219 on the yard, and he started towards the barge.

By Mr. BUFORD:

Q. Is not it a fact that his duty required him to be on top of the car; to be on top of the car, which he was climbing at the time of the accident?

A. It was his duty to be on top, but it was not necessary for him to get down and cross the track. He could merely have stepped across. He was instructed that way, to stay on top and step across.

Q. Who gave him that instruction?

A. I gave it to him.

Q. How is it you recall today having given him that kind of instruction, when you don't seem to have recalled it when you were examined at the Coroner's Inquest, having given him such an instruction?

A. It was not asked; I don't think it was asked.

Q. Were not you asked to tell all you knew, and did not you give these answers that I have read?

A. I told how I worked the barge.

Q. Why didn't you tell that too?

A. (Pause.)

220 Q. Why didn't you tell that before the Coroner?

A. What about? I think you did read on where I rode the car back, and instructed him how to carry the cars back on the barge.

Judge WILLCOX: I don't want to be captious, or make objections, but the Coroner's Inquest was to ascertain how the man came to his death, not whether he was instructed or not.

By Mr. BUFORD:

Q. Now, you say, Mr. White, that that was the rule; will you tell us who made that rule?

A. It was the rule of the yard.

Q. Who made it?

A. The company, I suppose.

Q. Have you got any rule book?

A. Have I?

Q. Yes?

A. I hav-n't any rule book.

Q. Have you got any rule book that says that a brakeman must step across the space between the one track and the other?

A. That is our instruction we give the men down there to do the work. It is not in the rule book. We hav-n't got—in other words, it is not in the rule book, but it is the way we instruct our men to do the work.

221 Q. That is to say, it is the way you conductors tell the men how to do?

A. We instruct our men not to get down on the ground, but to stay on top.

Q. To stay on top because they have to give the signal?

A. Give the signal, yes, sir.

Q. I believe it was this picture we were looking at just now; look at it, please, just once more (Referring to photograph heretofore filed marked Exhibit No. 2) you say that you came out here and threw this switch (indicating)?

A. Yes, sir.

Q. Where is this switch?

A. Right here opposite those points. That is the lever.

Q. Then you got up on the car after it had gotten past the switch?

A. Threw the switch then.

Q. Then you had to send it from that track (indicating)?

A. Just like that.

Q. Then you got—which side did you get on?

A. This side (Indicating).

222 Q. You got up on the same side, then?

A. The ladder was on that corner.

Q. You got on it here?

A. Yes, sir.

Q. How quick after it passed the switch?

A. I couldn't say how long. We don't handle cars very fast, and I couldn't say how quick.

Q. You got on somewhere on that same side that that inexperienced, green boy got on, and got on along here (indicating) and he got on along here somewhere?

A. I got on along here.

By Judge WILLCOX:

Q. Did you get on the car—on which side of the switch were you when you got on the car, next to the barge or the shore?

A. On the east side of it.

Q. Were you nearer to the barge than to the shore?

A. Nearer to the shore.

By Mr. BUFORD:

Q. Mark the point where you commenced to get on the car?

A. I couldn't say exactly.

Q. Do the best you can.

223 A. Sometimes we pull back, and the cars sometimes they—sometimes they will stop close to the switch. I would not like to mark nothing like that. I couldn't tell. I might have been a half car length from the switch. If I had known anything was going to happen I would have marked it down. I don't think I ought to be compelled to mark it exactly, when I might not have been in a car length of it. I might have been a car length away, you know, I don't care to make any marks, to say exactly.

By Mr. PETERSON: You have then got it down in black and white?

By Mr. BUFORD:

Q. I understand you to say, now, that when you got up on the car, coming in, just before the accident occurred; you got on the incoming car?

A. Yes, sir.

Q. On the same side of the track that Baugham got on?

A. I got up on the east side.

Q. You commenced to climb on the car, and he was climbing on the first car, and you were climbing on which one?

A. I was on top there, and caught the first car, and went up on top.

Q. You climbed up on the first car, and you say that he
224 attempted to climb upon the same side that you climbed up on?

A. Yes, sir.

Q. How far would that car run during the time you were climbing up?

A. I am unable to say that. I don't know the exact spot. Sometimes the engine will start a little quicker than at other times.

Q. Had you gotten on the barge before you got on top of that car?

A. No, I was not on the barge.

Q. You were not on the barge?

A. The car was not on the barge.

Q. When you got on top?

A. When I got on top there wasn't any car on the barge when I got up.

Q. How far were you from the barge when you got up on the top of the car?

A. That is a question I cannot answer. I don't know exactly how far the distance was from the barge when I got up on top. I don't see that it depends on that at all.

By Mr. BUFORD:

Q. Well, just answer this question: Cannot you tell the
225 jury whether you had gotten on the barge, or were still on the dock at the time you got on top of the car?

A. I was not on the barge when I got on top.

Q. Can't you give some idea how far you were?

A. I don't know as I could give exactly the distance.

Q. How far is it from the switch now to the end of the barge?

A. That is about a car length.

Q. Well, then, you could climb a car length—you could get on top of the car before the car would move its car length?

A. No faster than we move cars there, I could go twice before it went a car length.

Q. Was it travelling any faster when Baugham started around there than when you boarded it?

A. I don't think so, I couldn't see, of course.

Q. Well, now, the cars on the opposite track, the center track, was standing about here as in this picture?

A. About the same.

Q. How far was he from the flag pole when you saw him?

A. Well, I don't know exactly. I don't know the exact distance; I reckon something like a car length.

Q. A car length the other side of the flag pole?

226 A. Yes, sir, the other side of the flag pole.

Q. And he was then caught?

A. He was caught when I saw him.

Recross-examination.

By Judge WILLCOX:

Q. Will you look at photograph No. 3, and tell the jury whether that represents where you left the car on the inside track, which you first put on there?

A. Yes, sir, it was just about like I left it.

Q. In other words, the south end of that car is nearer the south end of the barge?

A. Yes, sir.

Q. Now, you got on—was the car you got on moving or standing still when you got on?

A. Moving.

Q. Moving towards the barge?

A. Yes, sir.

Q. Had it reached the switch, or not?

A. No, sir.

Q. You got on before it got to the switch?

A. Yes, sir.

Q. You had climbed up the top before you got on the barge?

227 A. Yes, sir.

Q. You never saw Baugham at all until your attention was called to him?

A. No, sir.

Q. Now, do you remember how far was the south end of the cars on the west track, from the end of the barge when you left them standing?

A. They were standing just clear. I don't know the distance exactly.

Q. Look at photograph No. 2, and state whether or not that shows the cars, the six cars left on the west track when you cut them off and left them there?

A. That shows how they were standing.

Q. Is that the location of the car when you last saw Mr. Baugham on the top of the car?

A. Yes, sir.

At this point court adjourned for one hour for lunch.

Afternoon Session.

PORTSMOUTH, VIRGINIA, December 3rd, 1913.

Mr. BUFORD: If your Honor please, as the only witnesses that we have are the witnesses of the railroad company, we have decided not to put on any further evidence at present, and will rest our case.

The plaintiff rests.

228 The plaintiff having rested his case, the defendant, to prove and maintain the issue on its part, introduced the following evidence:

F. J. BOYLAND being duly sworn, on behalf of the defendant testified as follows:

Examined by Judge WILLCOX:

Q. What are you initials?
A. F. J.
Q. What was your position with the N. Y. P. & N. Railroad December last?
A. General yard master at Port Norfolk.
Q. Did you have charge of the employment of brakemen and other men there?
A. I did.
Q. Did Mr. Richard T. Baugham make application to you for employment?
A. He did.
Q. Is it in writing?
A. Yes, sir.
Q. Look at the paper which I hand you, and state whether or not that is the original application for his employment?
A. It is.
Q. Did he fill out the application in your presence?
229 A. He did, sir.
Q. What is the date of his birth, as stated in the application.
A. March 14th, 1890.

NOTE.—The paper referred to is filed marked Exhibit No. 5, and is as follows:

"Form C. T. 48.

No. —.

New York, Philadelphia & Norfolk Railroad Company.

Application for Employment.

Name: Richard T. Baugham.
Occupation: Brakeman.
Department: C. T.
Date Employed: December 30th, 1912.

Form C. T. 799-*b* 6, 7, 1911.

New York, Philadelphia & Norfolk Railroad Company.

Application for Employment.

December 30th, 1912.

All applications must be made on this form in the handwriting of the applicant, and in the presence of the employing officer. Rec-

ommendations are required in all cases, and are accepted only from well-known persons, whose names, occupations and addresses must be given.

230 Date of Application: December 28th, 1912.

Name (to be given in full by applicant): Richard Thomas Baugham.

Address of Applicant: (City or town) Port Norfolk.

County (Norfolk), State (Virginia).

Place and date of birth: (Month) March, (day) 14th, (year) 1890, (City or town) Rich Square, (county) Northampton, (state) North Carolina, (country) U. S. A.

Height: 6 feet — inches. Weight: 154 pounds.

Color of eyes, blue; color of hair, light.

Scars or marks: Light scar over left eye.

Character of work for which application is made: Brakeman.

Previous occupation: Carpenter.

If previously employed on the N. Y. P. & N. Railroad, or any other railroad, give places, addresses and nature of employment.

At.....For "

" ..... " "

Reasons for leaving last situation: No work.

Recommended by L. M. Bailey.

231 *Report of Employment.*

DECEMBER 29th, 1912.

Mr. Jos. Restein, Train Master.

I have this day employed Richard T. Baugham. (Name to be written in full by employing officer.)

Department —. Occupation: Brakeman; Rate of pay: 25 cents to 27 cents per hour.

Has applied for membership in Relief Department.

Claim — Additional Death Benefit.

If formerly employed on the N. Y., P. & N. Railroad, please give below the following information, and any additional information obtainable covering previous employment to enable the superintendent receiving this report to obtain full previous record of the employed for pension department purposes:

Was last employed in —.

Department —.

Location —.

Occupation —.

Rate of Pay, $—.

Date of leaving, —.

231½ Cause of leaving. —

Remarks: Not previously employed in R. R. service.

Services: X Dec. 30, 1912.

(Signed) F. J. BOYLAND,
G. Y. M., Employing Officer.

Approved:
JOS. RESTEIN,
Train Master."

Q. About what size man was he?
A. He was an average size man.
Q. Was there anything in his appearance to indicate he was not of the age he seemed to be?
A. No, sir.
Q. Did you employ him?
A. I did.
Q. You did not give him any instructions yourself, did you?
A. I did not.
Q. To whom did you turn him over to be instructed by?
A. I turned him over to the conductor, and he went to work to instruct him.
Q. What conductor did he first work under?
A. Harry Boyland.
232 Q. Did you see him immediately after the accident?
A. I suppose two or three minutes.
Q. Where were you when the accident happened?
A. In my office, looking out of the window.
Q. You did not see the accident, of course?
A. No, I did not.
Q. Did you go down to the barge?
A. Yes, sir.
Q. Where was he when you got there?
A. Lying on the deck of the barge, between the tracks.
Q. Did you ask him anything about the accident?
A. I did not ask him, but he thought I was addressing the question to him, but I hadn't any idea when I asked the question that he was conscious, or capable of answering. When I said how did it happen, he said "Wait a minute and I will tell you," and after some few seconds, I don't know how long, but may be a few seconds, he said—he raised up on his elbow and said he was going up the side of the car and either didn't notice, or didn't know that the cars were so close together. I am not sure which term he used.
Q. That was the only reason he gave?
A. Yes, sir.
233 Q. Are you familiar with the location of the tracks on the barge?
A. Yes, sir.
Q. How close do the eaves of the box car come on the track between the flag pole and the apron on the barge?
A. The flag pole, the apron, and the barge—that is the end of the barge—you mean the end of the barge?
Q. The shore end?
A. As far as the rail is on the barge the tracks are 8 feet apart at the extreme end.
Q. How much do the box cars overlap, the eaves?
A. Let's see—about 16 inches.
Q. So, there is a 32-inch track up from the eaves of the car?
A. Yes, sir.
Q. Of course that is that distance between?
A. Yes, sir.

Q. That is the average box car?

A. I should say so, yes, sir. I am not certain as to the measurement. That is my recollection.

Q. Do you mean the eaves of the car project 16 inches beyond the side of the car or rail?

A. Beyond the rail.

234 Q. Can a man get between the eaves of the car, standing on the tracks, between the flag pole and the apron of the barge?

A. Yes, sir, he could, with the average box car.

Q. When that car passes the flag pole, can he pass between the flag pole and the average box car in safety?

A. No, sir.

Q. After you go beyond the flag pole, the tracks begin nearer, do they not?

A. Yes, sir.

Q. About how far would you have to go beyond the flag pole before the cars would get so close together a man would be caught between the eaves?

A. That would depend something on the size of the car. On the average car I would say 20 to 25 feet.

Q. Towards the center of the barge?

A. Yes, sir, towards the center of the barge.

Cross-examination.

By Mr. PETERSON:

Q. There is no standard box car, is there?

A. No, sir.

235 Q. The size of a box car, in common use on American roads, varies with the use for which they are intended?

A. Yes, sir, and the length of the time they have been built.

Q. And the practice of the different roads?

A. Yes, sir.

Q. I mean by that, a car designed as a foreign car or a domestic car is not it true those cars are greater breadth or beam than the ordinary car?

A. Yes, sir.

Q. The cars of the N. Y., P. & N. Railroad observe the general average of the standard of the Pennsylvania, do they not?

A. They do.

Q. Will you state to the jury what the Pennsylvania standard is as to the width of the car?

By Judge WILLCOX: I want to explain to Mr. Peterson the N. Y., P. and N. road does not only handle its own cars, but the cars of all railroads.

By Mr. PETERSON: I understand that thoroughly, and I reckon that is true of other roads.

A. I could not give that all over dimensions, but I could give it inside dimensions.

236 Q. Could you approximate it?

A. Not with any degree of accuracy.

Q. What is the inside dimensions?
A. Standard Pennsylvania box cars 8 foot 6 inches wide inside, 34 feet long inside.
Q. What is the standard gauge of the track?
A. 4 feet 8½ inches.
Q. 8 feet 6 inches inside, and 34 feet inside?
A. Yes, sir.
Q. And the gauge of the track is 4 feet what?
A. 4 feet and 8½.
Q. State whether or not cars of that size, proceeding upon the barge from the dock, would at any point be in actual physical contact with the cars standing on the inside track on the same side of the central line?
A. Any standard dimension car, not if loaded, and divided as they should be, they would not—there might be a list in the loading that might cause it.
Q. If well divided?
A. They would not.
Q. What would be the approximate distance between the
237 eaves of those cars?
A. I should say to 2 to 4 inches.
Q. That is to say a car of the standard size?
A. I mean by that it varies from 2 to 4.
Q. That is to say cars of a standard size?
A. I mean by that it varies from 2 to 4, the curve, from the grab handle, the irons, etc.
Q. Then the car has some little peculiarities of its own?
A. Yes, sir.
Q. Please state the average standard: 34 feet, 4 feet 6½ wide inside dimension, if you would find a car of that size standing on the inner central track, it would be a distance from 2 to 4 inches varying with the length of the car?
A. Yes, sir, speaking from recollection. I never made any measurements.
Q. Yes. I do not want to misrepresent you?
A. I never made a measurement in my life.
Q. Before the car enters upon the barge at what you call the apron, and what I call the edge of forward deck, what would be the distance between the standard size car, from the eaves, to another standard size car, flush with the edge of the deck, where both
238 are standing on the edge of the deck?
A. I could not give that, but I should say on the extreme end, I should say about 3 feet.
Q. About 3 feet?
A. About that.
Q. About that. I understand. Well, Captain, taking that car, the one that you have just described as a type, or standard, 34 feet by 8 feet 6, taking that as the standard, or type, what would be the variation in that of any other type which you might occasionally encounter in the case of foreign cars, or cars of other railroads of greater size?

A. Well, they run as much as 10 feet wide.
Q. 10 feet wide some are?
A. Yes, sir.
Q. Now, if you add to that an occasional list, or if it don't set plumb on the trucks, or if they are out of order, there would be a contact sometimes?
A. Very often there is.
Q. Speaking from your observation, and also approximately, and considering now the inside track, with the out track on the
239 same side, what would be the distance between the eaves of a standard size car, on that inside track, from the eaves of the standard car on the outside track?
A. Between the outside track and center track.
Q. On the same side of the medial line?
A. That would be probably 12 or 14 inches. I should say, approximately, from observation. I never measured.
Q. That would be considered individually then?
A. Yes, sir.
Q. Now, from the edge of the apron, or deck, where the barge is in contact with the dock, to the flag pole, to which Judge Willcox has referred, you would estimate the distance to be what?
A. About 10 or 12 feet.
Q. From the edge of the barge to the flag pole?
A. From the edge of the barge to the flag pole.
Q. I understood you to say beyond the flag pole, before the cars got so near as to confine a man, you would estimate to be somewhere about 22 feet?
A. Yes, sir.
Q. What—speaking of the distance from where the edge of the cars would get to touch a man, it would be 32 feet approximately?
240 A. About that approximately.
Q. You yourself don't have any knowledge of, or any occasion to load barges, do you?
A. I have loaded them, but that is not my business.
Q. That is not your business?
A. No.

By Mr. BUFORD: Permit me to ask this question:

Q. Did I understand you to say that the overlap of the car, the average car, is about 16 inches: that is to say, it extends about 16 inches beyond the rail?
A. I did say that, but that is not enough. It is more than that. I have not figured out the dimensions.
Q. Correct that, according to your best judgment?
A. What is the question?
Q. If you made it 16 inches, you figure that it would not overlap at that?
A. I gave that as approximate, offhand, and not as positive.
Q. Since your attention has been called to it, could you give the jury an idea that would be more satisfactory to yourself?

A. Well, it would be 2 feet, and probably an inch, would it
241 not? I shall figure it from 4 feet 8½ the gauge of the car. It would be about 8 feet to the eaves—4 feet 8½ from the line.

Q. 9 feet would be 108 inches?

By Judge WILLCOX: 8 foot 6 inches inside is 108 inches. 56½ off of that would be 51½ and ½ of that would be 25½—2 feet 1½ inches. He was not far wrong.

By Mr. BUFORD: That would leave 4 feet 2 inches between the track and the edge of the barge.

By Judge WILLCOX: If it was 4 feet 2 inches, it would not touch. That would leave clearance there?

A. They figure on 4 feet, and 8 foot center. It would give 4 feet clearance at the extreme end.

Redirect examination.

By Judge WILLCOX:

Q. Something was asked about automobile cars. There was no automobile car on either track shifters that morning, was there?

A. I could not tell about that. I have the list.

Q. You don't remember?

A. No, sir.

Q. You know the cars are—are not the cars equipped with
242 ladders on each end?

A. Not all of them.

HARRY L. BOYLAND, being duly sworn, on behalf of the defendants, testified as follows:

Examined by Judge WILLCOX:

Q. What is your full name?

A. Harry L. Boyland.

Q. Are you the son of Mr. F. J. Boyland, the yard master?

A. Yes, sir.

Q. Were you conductor with the Railroad last December when Mr. Baugham was hurt?

A. Yes, sir.

Q. Do you remember Mr. Baugham coming to work the day before he was hurt?

A. Yes, sir.

Q. With what conductor did he first go to work?
243 A. With me.

Q. Did you have any conversation with him, or instruct him as to his duty, and as to the requirements of the work of brakeman?

A. I did.

Q. Did you go into it fully with him?

A. Yes, sir.

Q. How many barges did you load and unload during the first day that he worked with you?

A. Four.

Q. You unloaded 50 as a matter of fact, but he only worked on four?

A. On four.

Q. Did he work on No. 14 the day before he was killed?

A. Yes, sir.

Q. How many times did he work on that?

A. Once.

Q. He loaded and unloaded that once?

A. Yes, sir, all on the last track.

Q. Which of the barges did he load?

A. Barge- 2-4-16.

244 Q. Are those barges like barge No. 14, so far as the arrangement of the track is concerned, and the house?

A. Exactly the same.

Q. Exactly the same?

A. Yes, sir.

Q. Now, you say you instructed him as to the dangers of the position, and as to his duty?

A. Yes, sir.

Q. Had you known him any length of time?

A. I had been knowing him 3 or 4 years.

Q. You were friends, were you not?

A. Yes, sir.

Q. Was he a man of average intelligence, so far as you observed?

A. So far as I know, he was above the average, apparently.

Q. Was anything said by him, or done by him, to suggest, he did not appreciate the dangers or risk of the position that he held?

A. No, sir.

Q. Was there anything suggested to you you should tell him further that you failed to do?

245 A. No, sir.

Cross-examination.

By Mr. BUFORD:

Q. How long had you known Mr. Baugham?

A. Three or four years.

Q. You knew that he had never had any previous experience in Railroad service?

A. Yes, sir.

Judge WILLCOX: I will admit that he did know that he had no railroad experience.

Mr. BUFORD: Will you admit that the railroad knew it?

NOTE.—It is admitted that he had no previous railroad experience and the railroad knew it.

By Mr. BUFORD:

Q. You were asked if you gave the young man instructions: what did you tell him?

A. I told him most everything I could tell him, in fact. I took him and showed him, and went with him and showed him.

Q. Showed him what?

246 A. How the work was done, and the danger attached to it.

Q. What dangers are you talking about?

A. Well, principally getting on and off the cars while in motion on the barge, and in the pilot house.

Q. What did you tell him about getting off and on?

A. I told him not to do it under no circumstances, except on the leading car on the end ladder.

Q. Except the leading car on the end ladder?

A. Yes, sir.

Q. What else did you tell him?

A. I told him everything I could tell him.

Q. We are just asking you to tell what you did tell him?

A. It has been over a year ago.

Q. It would be right hard for you to recall?

A. To recollect the exact words I told him.

Q. I am not asking you the exact words; I am not asking you anything impossible, but I am asking you what you told him; it is so indefinite to say you told him everything that you could tell him?

A. I told him all I could tell him about the work.

Q. About the work?

A. Yes, sir.

247 Q. If you know now you told him all you could tell him, you ought to know the substance of what you told him?

A. I went right along with him, and I told him the different phases of the work as we went along, and I went right with him, to show him what to do, and how to do it, and how to take care of himself, and how to conduct himself.

Q. How did you tell him how to take care of himself?

A. I told him to stop, look and listen.

Q. Stop, look and listen?

A. Yes, sir.

Q. What were the instructions you gave him with reference to taking care of himself?

A. I told him to take care of himself, and to look what he was doing.

Q. Recall some of the words you told him?

A. I can't do that now.

Q. You cannot?

A. No, sir.

Q. Are those all the words you recall having said to this young man?

248 A. Except what would come up in the conversation, while we were showing him.

Q. While actually doing the work?

A. Yes, sir.

Q. Is not it customary, and don't you do it too, when you think the occasion requires it, to get on the cars while they are moving?

A. Yes, sir.

Q. That is the general practice of the barge, isn't it?

A. No, sir.

Q. Then, it is the occasional practice?

A. No, sir.

Q. Then the men do do it, don't they?

A. (Pause.)

Q. Capt. White testified that he did it, and you said that you got on while moving?

A. Not on the car while the barge was moving. You said did I ever get on cars moving, and I said "Yes."

Q. I was talking about the barge?

A. I did not understand that. You did not say barge.

249 Q. Do you mean to say you never saw a man get on a car in motion on the barge?

A. I don't mean to say that.

Q. Let's see how close we can get together. You won't deny you saw men get on the cars in motion on the barge?

A. I don't affirm it.

Q. Will you deny it.

A. (Pause).

Q. Will you deny it?

A. If I denied it I would be affirming it.

Q. What will you do then; it is up to you; take your choice?

A. I can't deny it and tell the truth.

By Judge WILLCOX: Tell the truth about it.

By PETERSON: This witness is able to take care of himself.

By Mr. BUFORD:

Q. We want to know the truth in this case; don't feel any apprehension about telling the truth?

A. I am not.

Q. So you cannot deny that men did get on cars on the barge, the train men, while the cars were being moved?

250 A. (No answer.)

Q. Have you answered that question?

A. No, sir.

Q. Won't you answer it, please?

A. Put that question again.

(Question read.)

A. No.

Q. Was there any rule of the company that prohibits them from getting on the cars while being moved on the barge?

A. Yes, sir.

Q. Where is the rule?

A. It is the general rule.

Q. The general rule book of the company?

A. Yes, sir.

Q. Please see if you can find it in there (handing witness book)?
A. It is not in the rule book there. I know the general principle would teach a man better than to get off and on the cars when not in a safe place, persons I observe.

Q. That is practically all you train men had to go by?

251 A. No, sir; there is the instructions we receive when breaking in, when being broke in.

Q. How long have you been "broke in"?
A. That is one of our first instructions.
Q. How long have you been broken in?
A. About five years.
Q. How old are you?
A. 26 years old.
Q. Then, what were they to do to get from one car to the other car, or from one track to the other?
A. They usually step across the top.
Q. When you say you usually did, there was sometimes you did, and sometimes you didn't—then, what would you do?
A. If going to get up when in motion, he would get on the north ladder, on the leading car.
Q. The north ladder on the leading car?
A. The end ladder, or he would stay off.
Q. How were the cars equipped with ladders?
A. How are they equipped? Some equipped on the side, some on the end.

Q. Some ladders are on the end of the cars?

252 A. Yes, sir.

Q. Then do you mean to say, then, what a man ought to do under those circumstances, would be to stand in front of those cars and catch that ladder as the car came along?
A. Yes, sir.
Q. Suppose the side ladder was on that car, how would he get on that?
A. Stay off.
Q. You would not get up there then?
A. No, sir, I would not get up.
Q. You would not get up—well, maybe somebody else would; there was not any other way provided for him to get up but by the ladder provided for him?
A. No, sir.
Q. That would be the only way?
A. Yes, sir.
Q. How was the car Mr. Baugham was climbing on, when he got hurt, equipped with ladders?
A. I was not on that car.
Q. Now, Mr. Boyland, tax your memory a little better, and see if you don't recall having had a conversation with Mr. Kin-

253 dred Baugham—do you know him?

A. I do.
Q. He is the brother of the young man who was killed?
A. Yes, sir.

Q. And he is the personal representative here in this case?
A. Yes, sir.
Q. Tax your memory and see whether or not you had any conversation with him about his brother's death?
A. (Pause.) I think he had a conversation with me.
Q. Well, we won't dispute over which had the conversation; you talked about it with him. Did you tell him anything about whether you had given his brother instructions or not?
A. I did.
Q. What did you say?
A. I told him I could not have taken any more pains if he had been my brother, and neither I could.
Q. What is that?
A. I could not have taken more pains if he had been my brother.
Q. Where did that conversation occur?
A. I don't know. I don't know where and when it was.
Q. But you do recall the conversation?
254 A. Yes, sir.

Mr. BUFORD: Would your Honor let me speak to Mr. Baugham; he is outside and I would like to get the exact words.

Judge WILLCOX: I would object to that. That is the very reason we have separated the witnesses.
The COURT: You had the witnesses separated.
Mr. BUFORD: What I want is to introduce a statement here that he has made on a previous occasion, and I want to ask him if he did not say so and so. It is only under the ruling, that I want to lay the foundation, that I wish to ask the question.
The COURT: The purpose of the exclusion of the witnesses is to keep them from knowing the testimony already introduced before the jury. Now, if you go to this witness and tell him the testimony of the witness now on the stand, that rule is violated.
Mr. BUFORD: It would not have that effect here in this case.
The COURT: You cannot go and have the conversation with this man with reference to this without telling him what this
255 witness has said.
Mr. BUFORD: I wanted to find out what the conversation is, so that I can lay the foundation.
The COURT: I do not think you can do that.
Mr. BUFORD: My object is——
Judge WILLCOX: He has put this witness on the stand for this purpose, and is asking him this question on cross examination that has no reference to anything brought out on direct examination. He was asking him with reference to a conversation he had with Mr. Baugham, and he cannot introduce Mr. Baugham for the purpose of proving that testimony, as to any conversation between him and the witness.
The COURT: This witness is out of his order in introduction.
Mr. BUFORD: I think my friend is mistaken. Of course I could not go and ask the witness an irrelevant question, but my friend Judge Willcox mistakes it seems to me, the application of the question.

This question on cross examination is responsive to the
256 direct examination. Now, in this case, Mr. Boyland is put on the stand for the purpose of showing he is one of the undoctors who gave warning to the deceased. Now, that is the purpose of the examination in chief:

The COURT: I think you have the right to cross examine him on that line without making him your witness, but the part I have in mind is whether you have a right to introduce the conversation with the witness for the purpose of cross examination along the line you are now pursuing.

Judge WILLCOX: My objection is that I don't think he has the right to contradict this witness as to any matter he has brought out himself, and not in response to direct examination.

By Mr. BUFORD: I will ask this question:

Q. Did not you, in the conversation which you recall having with Mr. Baugham, tell him that you did not fully instruct his brother?

Judge WILLCOX: I want to note an objection to that question, because it is not responsive to the direct examination. I
257 have not brought out anything in the world about any conversation with anybody else. My friend asked this witness if he had a conversation, and he told what it was. As I understand it, when you examine a witness on the facts not brought out on direct examination you eliminate evidence, and you cannot contradict your witness.

The COURT: As I understand the situation, with reference to this witness, is that he was asked on his direct examination——

Judge WILLCOX: Mr. Baugham is in court.

Mr. BUFORD: I did not know he was in court. I suppose he did not know we would need him again as a witness. If your Honor says so, I will tell him to go out of the Court now.

The COURT: I have no objection to his staying in the Court room.

Judge WILLCOX: This is a witness that was summoned by Mr. Buford.

Mr. BUFORD: I never had a talk with Mr. Boyland. The witnesses we summoned were all railroad employees. Mr. Boyland was
258 not examined at the Coronor's Inquest, and I have not taken the liberty of talking with any of them in connection with this matter.

The COURT: Let's get back to the question and the objection. As I understand it, the witness was introduced by the defendant, and was examined, and in his examination in chief stated as to whether or not he instructed the plaintiff's intestate. This cross examination is for the purpose of testing his recollection as to that. He testified affirmatively, that he went with him and instructed him, and on cross examination he was asked whether or not he had certain conversation with certain persons. He recollects the conversation, but not the time or the place, and states in substance what was said. On direct examination he told this person, who turned out to be the brother of the deceased, that he went with him, and that he

warned him as if he were his brother. It does appear to me that he has the right to pursue that line of cross examination.

Judge WILLCOX: I want to make the further point, that
259 these gentlemen are injecting into this trial collateral matter as to whether or not this conversation occurred between Mr. Baugham and Mr. Boyland. Now, my friend is introducing it to impeach this man. He is impeaching him on something he brought out himself.

NOTE.—The point was argued at length by counsel. The objection was overruled, and an exception noted by counsel for the defendant.

By Mr. BUFORD:

Q. Did not you go further and tell him you had not given him the instructions which he ought to have had?

A. I did not.

Q. And that you did not have time to do it, or words to that effect?

A. No, sir, I never told him anything to that effect.

Q. Was not he called on Sunday morning to do his first day's work, Sunday the 29th of December, after the work had been commenced?

A. Yes, sir:

Judge WILLCOX: Your Honor understands that I object to all the questions along this line and note the same exceptions.

260 By Mr. BUFORD:

Q. He was sent for after the work was started?

A. I don't know whether he was sent for or not.

Q. What time did he commence to work the morning you had him?

A. I don't remember that.

Q. Had the work begun when he got there or not?

A. Yes, sir.

Q. It had begun?

A. Yes, sir, how long it had been in progress I don't remember now.

Q. What caused Mr. Baugham to come there that morning?

A. I don't know what caused him to come unless they sent for him.

Q. Unless who sent for him?

A. I don't know.

Q. Will you tell the jury now what is your first recollection of having seen Mr. Baugham the morning that you worked him?

A. He came to me and said he had been sent to me, and I took him in hand, and started right on with him.

Q. Did you know previously he had been employed?

A. No, sir.

261 Q. You got your first information that he had been employed to work on the road from the fact of his coming to work that morning?

A. He told me he had been sent to me.
Q. Up to that time you knew nothing about his employment?
A. No, sir.
Q. You had not heard anybody mention his name?
A. No, sir.
Q. Had anybody turned him over to you there to instruct him?
A. No, sir.
Q. You had no directions from anybody to give him any instructions?
A. He knew that comes with the conductor That is standing instruction for the conductor, to instruct him.
Q. That is standing instruction for the conductor to instruct him?
A. Yes.
Q. Where were you when you first saw him that morning?
A. I don't remember now.
Q. Were you on the barge?
A. I was not on the barge.
Q. Were you on the dock?
262 A. No, sir, I don't think—no, I was not working the barge when he got there.
Q. You were not at either one of those two places, but you don't know where you were?
A. No, sir.
Q. You know what you were not doing, but you don't know what you were doing?
A. I could have been doing a thousand different things.
Q. You know one or two of the thousand things you were not doing, but you cannot remember what you were doing?
A. I know I was not on the barge, but I can't remember what I was doing.
Q. Were you busy that day?
A. I don't remember now.
Q. Where were you when you gave him the instructions?
A. I gave him instruction wherever we should happen to be, wherever we were doing the work, I instructed him as far as that goes.
Q. Wherever you happen to be, with the different work, whatever you happened to be doing, you would give the instruction there?
A. Yes, sir.
Q. And your instruction extended to the things you were doing as you were doing those things?
263 & 264 A. Yes, sir.
Q. How much of the day were you working with Mr. Baugham on the barge?
A. Long enough to work four barges.
Q. How much time did that take?
A. Ordinarily about 4 hours.
Q. Eh?
A. Ordinarily 45 minutes to the barge.
Q. That would be about three hours. What were you doing the rest of the day?

A. I don't know now, but doing whatever the yard master told me to do.

Q. You were working under the directions of the yard master?

A. Yes, sir.

Q. How far did your duty extend; how much space of the railroad track?

A. The whole yard.

Q. You did not work except on the yard?

A. No, sir.

Q. You don't run on the road?

A. No, sir.

265 Q. There is no road chief here?

Judge WILLCOX: No road chief here.

By Mr. BUFORD:

Q. What part of the barge did you work with Mr. Baugham, while with him?

A. All of it.

Q. All of it?

A. Yes, sir.

Q. What were your duties?

A. I was conductor.

Q. I mean what did that entail upon you?

A. It makes me responsible for the crew.

Q. It makes you responsible for the crew?

A. Yes, sir.

Q. Responsible in what sense, seeing that they attend to their business?

A. Yes, sir.

Q. Responsible for the way they discharge the duties of their respective positions?

A. Yes, sir.

Q. So you have to look out and see they do what they are hired to do?

266 A. Yes, sir.

Redirect examination.

By Judge WILLCOX:

Q. You spoke of telling Mr. Baugham that when he got on the car to get up on the end ladder; that was perfectly safe, wasn't it?

A. Yes, sir, on the north ladder on the leading car was perfectly safe place.

Q. Opposite, on the side next to the center of the barge, was that a safe place?

A. No, sir.

Q. Did you tell him so?

A. Yes, sir, I did.

Q. You said in your direct examination, and also in answer to Mr. Buford, that you showed him as the work progressed?

A. Yes, sir.

Q. You have been a conductor for five years?
A. No, sir, but I have been with the company five years. I was conductor, extra conductor, about three years and a half.
Q. You have been working as a conductor three and a half years?
A. Yes, sir.
Q. During that time have you had experience in instruct-
267 ing green brakemen?
A. Yes, sir.
Q. What does your experience teach you, as to whether it is best to tell him verbally, or go with him and show him as the work progresses?
A. That is best, yes sir. Show him.
Q. Did you do that with Mr. Baugham?
A. Yes, sir.
Q. Did you show him as the cars were shoved on the barge how to go about the work?
A. Yes, sir.

By Mr. Buford: Don't lead him, please sir.

Recross-examination.

By Mr. Buford:

Q. At what time do brakes have to be applied to the first car shoved on the barge?
A. About the time it gets around the curve, on its axle.
Q. Suppose on the center track?
A. Put it on any time.
Q. Put it on any time?
A. Yes, sir.
Q. The engine does not stop, when it is shoving eight cars in the center track, it does not stop pushing those cars until they have all gotten on?
268 A. Sometimes.
Q. As a rule?
A. As a rule it does not.
Q. As a rule that head car is in motion?
A. Yes, sir.
Q. All the time from the time it comes on the barge from the landing until the brakes stop it?
A. Until the engine stops it, or the brakes break loose.
Q. Either until the engine stops it, or it stops with the brakes?
A. Yes, sir.
Q. Now, then, at what time while this car was in motion ought the brakeman to climb up on the end ladder?
A. We don't climb the end ladder. We step from the side track to the center track.
By Judge Willcox: You said "track"—you meant car?
A. Yes, he was asking about the time we usually go on the car going on the center track. I told him when the car comes by us on the side track.
Q. You step from car to car?

A. Yes, sir.

By Mr. BUFORD: Then what did you mean by telling Judge Willcox that the safe way was to get up on the end ladder?

A. He asked was there a safe way to get up, and I told him yes.

269 Q. That is about the most unsafe way if the car is in motion?

A. No, sir.

Q. Do you tell the jury it is a safe way to stand between the rails and catch that ladder as the car comes rolling down on you?

A. The safest way is to step on the side of the car on the end ladder.

Q. Suppose the car is not equipped with end ladder—if you use a ladder you have to go up the side ladder?

A. If you use it, yes, sir.

By Judge WILLCOX:

Q. Your instruction, as I understood you, was not to do that?

A. Yes, sir.

J. C. HUBBARD, being duly sworn, on behalf of the defendant, testified as follows:

Examined by Judge WILLCOX:

Q. What is your name?

A. J. C. Hubbard.

Q. Are you employed by the N. Y. P. & N.

A. Yes, sir.

Q. Special officer?

270 A. Special police agent, yes, sir.

Q. Were you so employed last December?

A. Yes, sir.

Q. When did you first hear of this unfortunate accident?

A. I was in Norfolk, and I heard it about 9:15, by phone, to meet the tug.

Q. The tug that was bearing Mr. Baugham?

A. From Port Norfolk to the hospital.

Q. Did you go with him to the hospital?

A. Yes, sir.

Q. Did you have any conversation with him?

A. A little.

Q. State what he said?

A. I said "Tommy, how in the world did you get hurt," and he was breathing so badly he said "I will tell you directly," and they put him in the ambulance, and he asked me to go with him, and I told him that I would, and I assisted him in, and then I said "Tommy, how in the world did this happen." He said "I went around the car and went to crawl up on the side of the car, and got jammed with the car on the side of the track." I said "What in the world were you thinking about, Tommy," and he said "I was not looking."

271 Q. You speak of him as "Tommy"; had you known him any length of time?

A. Ever since he had been in Norfolk.

Q. Can you tell who suggested to him to apply for this employment?

A. I did.

Q. How long before he applied?

A. The Friday, I think, before that. Capt. Boyland said that he wanted some good young man, and I said "I think I have got one," and he said "If you have, send him to see me," and I went to the drug store where the young man had been working sometime before, and I asked Mr. Bailey if he knew where Tommy was, and he said he would be there that night, and I went on to the lodge, and I said "If Tommy comes tell him that I want to see him." He came on Tuesday to see me.

Q. And you told him what the job was?

A. I told him to go to see Captain Boyland, and that I thought he could get a job. I met him Saturday about eight o'clock, and he said he had been to see Mr. Boyland, and he was not in the office, and after that I saw him and he said that he had gotten the job, and would go to work.

Q. Did he appear to be a full grown man?

A. Yes, sir, he was a full grown man, weighing between
272 150 and 160 pounds, I should say.

Q. How was he with reference to intelligence?

A. Above the average. That is the reason I wanted to get him.

Cross-examination.

By Mr. BUFORD:

Q. Was he suffering much when you went over on the boat?

A. Yes, sir, very much.

Q. He was a young man that attracted you?

A. Yes, sir from a little boy. I should say take him from fourteen to fifteen years old. He attracted me very much when I first knew him.

Q. I don't know whether you can give me the information that I want to find out about or not, but what I want to find out is the distance between the railroad tracks—now the western track—the western rail of the center track, of the left center track, and the eastern rail of the outside track?

By Judge WILLCOX: I will put Captain Richardson on to prove the whole thing.

By Mr. BUFORD: Very well.

273 Captain EDWARD RICHARDSON, being duly sworn, on behalf of the defendant, testified as follows:

Examined by Judge WILLCOX:

Q. How long have you been boat master for the N. Y. P. & N.?

A. Twelve years last April.

Q. Have you had charge of the floating property, that is, I mean, the barges during that period?

A. Barges, tugs and steamers.

Q. Where is your office?

A. At Port Norfolk.

Q. Did you have to keep in touch with the movement of the barges, the loading and unloading?

A. I am not in charge of the physical operation of the cars, of the men who handle them, but I have to be as to the loading and unloading.

Q. How many barges has the company of the same type as No. 14?

A. Nine.

Q. State the arrangement of the tracks—is the arrangement of the tracks on each of the barges exactly alike on 14 at the time of the accident?

A. Practically. There is a little arrangement around the
274 house and such as that, but it is practically the same as the other.

Q. The difference is further towards the rear end of the barge?

A. 100 feet from the end of the barge, propable.

Q. What has been your experience with those barges; has that been a satisfactory arrangement of the tracks?

A. Why, we arranged the tracks originally, the side tracks, the center line tracks, and they are as they have always been.

Q. Has that been a satisfactory arrangement?

A. The center tracks very, yes, sir.

Q. Are you building a new barge?

A. Yes, sir, we have a contract for her on the 22nd of October.

Q. How is the center track arranged, with reference to the other?

A. It is right by the same drawing.

Q. Has the C. & O. railroad occasion to use similar floating property?

Mr. PETERSON: We object to that if your Honor please.

The COURT: I am assuming now that he is going to start with the C. & O., and is going on down and show that the same thing exists.

Judge WILLCOX: The only company having the same service here is the C. & O., so far as this particular arrangement is concerned.

275 Mr. PETERSON: Then we shall have to object.

NOTE.—The point was argued at length by counsel.

Judge WILLCOX: I want to prove by Capt. Richardson that the C. & O. use this class of floating property, and have found it the best, so far as experience goes, and they are using the same location of track as this company is on its barges.

NOTE.—The point was argued at length by counsel.

NOTE.—The court allowed the question to be answered, and exception was noted by counsel for the plaintiff.

A. They have been chartering our barges on several occasions and the last barge they built we furnished them a copy of our plans to build it.

By Judge WILLCOX:

Q. And it is built on the same plan as this one?

Mr. PETERSON: We save an objection as to that question.

A. (Continuing:) On October they began the three track barge with the center track diverging in the side track like ours. The tracks diverge in the center, and there were three tracks on it.

276 By Judge WILLCOX:

Q. Are they as close together as the tracks on our barges?
A. They look about the same. I have not measured them.
Q. You have seen them frequently?
A. I have been on them.
Q. How long have you been with the company?
A. 28 years.
Q. How long have you been using barges arranged as No. 14 barge at the time of the accident?
A. I think we arranged those tracks originally about 11 years ago.
Q. They have been that way ever since that to the time of this accident?
A. Yes, sir.
Q. During that time, how many accidents have happened on the barge to the men being caught between the cars?
A. I don't recall to mind any one being caught between the cars. There was a man caught between the car and the house seven years ago, coming from the hatch below, and got caught, and pulled against the house. Then 10 years ago there was a brakeman
277 knocked off the side ladder by the flag pole. I didn't see it. He was not hurt. I don't think he stopped work.
Q. You speak about that house in respect to that house that you and Mr. Boyland speak about, as to the danger of that house, what is the distance of the house above the roof of the ordinary box car?
A. 4 feet, I guess.
Q. Could a man stay on top of the car, and go under that house?
A. Not unless he stooped over.
Q. That is what he had reference to?
A. Yes, sir.
Q. You say you have since this accident, changed the location of the outside tracks, on the barge?
A. Yes, sir.
Q. Has that affected the location of the two inside tracks at all?
A. Not at all.
Q. Have you the blue prints here?
A. Yes, sir.
Q. Bring them out?

NOTE.—The blue prints are produced.

278 Q. Is that the way those little tracks are arranged as they were then?

A. That is the way they are running on this barge.

Q. So it was—some question was asked by Mr. Buford, of one of the witnesses, about widening it; what would be the difficulty about widening the barge?

By Mr. PETERSON: Are you introducing him as an expert?

Judge WILLCOX: I will withdraw the question.

By Judge WILLCOX:

Q. Do you know how the old tracks were located there on the barge?

A. Yes, sir.

Q. Are they located where they ought to be?

A. In my judgment, on the old barge, we had them on the outside, and they proved incompetent, and we moved them inside, and adopted this method.

Q. Those stanchions, are they located between the inner rail of the outside track, and the outer rail of the two outside tracks?

A. Yes, sir.

Q. How much do they take up, how much room between?

A. They are about 12 inches on the face.

279 Q. Taking from the points there, Captain, will you please tell me what is the distance between the inner rails, inside rails of the barge, inside the tracks, and the edge of the apron of the barge?

A. That is probably 8 feet.

Q. Eight feet?

A. Yes, sir.

Q. What is the distance of the flag staff from the same rails?

A. About 2 feet 7 inches.

Q. How much?

A. 2 feet 7 inches from the center of the rail to the center of the flag staff.

Q. What is the distance between the two rails?

A. 25 feet north of the flag staff.

Q. Don't give me half; give me from rail to rail?

A. I gave the other half. I will give this from rail to rail. 6 feet 3 inches.

Q. What is the distance from the flag staff to the apron of the barge?

A. You mean where the end of the rail stops?

Q. Yes, where the end of the rail stops?

280 A. 21 feet 6 inches.

Q. From the end of the rail to the center of the flag staff?

A. Yes, sir, that is shown on this. Straight down the center line of the barge. I am measuring down the center line of the barge, from the end of the barge where the rail stops—21 feet 6 inches.

Q. What is the distance from the edge of the barge where the rail ends to the point opposite—to a point which would be nearly oppo-

site to a point on the west track, where the car would stop after entering the curve?

A. It would depend upon the car, where it might be stopped.

Q. What is the distance, measuring along the inside line of the west track, from the edge of the barge to a point where the distance between the outer rail of the inner track and the inner rail of the outer track is six feet?

A. 38 feet 6 inches.

Q. How far would the rear end of that car be from the edge of the barge when it had passed down the west track sufficiently far to allow cars to clear it on the middle track?

A. We made some actual tests of that, when arranging the track. It was 32 feet.

281 Q. A car would have to be 32 feet from the end of the barge, on the end of the track, before a car moving on the middle track, on the same side, would clear it?

A. The test we made was 32 feet. I made some tests on that when we were making the changes.

Q. Now, Captain, is this blue print that you have just been testifying, that represents the western half of the deck of the barge, doesn't it?

A. Yes, sir.

Q. It does not show either track on the eastern half?

A. No, sir, only working back to lay the tracks by.

Q. Is there a blue print, showing the exact location of that portion of the barge and track, is that accurately ascertained?

A. As far as I am able to tell.

Q. You know it is?

A. Yes, sir.

Judge WILLCOX: I desire to offer in evidence the blue print showing the western half of the same barge, with the tracks as they are now located.

A. I have blue print showing the plan of the new barge we are having built, where the tracks are supposed to be located.

282 Q. This is the plan of the new barge, and is a copy of the location of the track on the barge as they are now?

A. Yes, sir, 50 feet between.

Judge WILLCOX: The same is offered in evidence.

NOTE.—The blue print is filed No. 7.

Cross-examination.

By Mr. BUFORD:

Q. What did you say your occupation is?

A. I am boat master, and have charge of the floating property of the New York, Philadelphia & Norfolk Railroad.

Q. You have no expert knowledge on the subject of the construction of barges?

A. Only 20 years' experience at the business.

Q. Not 20 years' experience building?

A. I have had supervision of all the boats, the supervision of the plans of all the boats before they are built, but I am not the architect who designs them. I commenced looking after the boats of the company probably 1899 or 1900, when the Pennsylvania was built, which was the first boat.

Q. You don't claim to be an expert on how this barge ought to be constructed?

283 A. No, only I can judge how it should be.

Q. You don't claim to have any comprehensive knowledge of how barges are constructed generally, by people who use barges, other railroad people?

A. It depends entirely upon the nature, upon the nature of what you are speaking about. If you are speaking about calculating the longitudinal strength of the barge, and the measurements of it, what should be used, I say no, but if you ask me whether it would be a fair working barge for our services, I would say that I was thoroughly competent to pass on it, and to pass on that question.

Q. Have you ever worked for any other company?

A. I have put in 28 years with the New York, Philadelphia & Norfolk Railroad Company.

Q. You say they have the same barge—the same kind of barge that was used by the company when the accident occurred to Mr. Baugham, that it used, the same kind of barge you used by the C. & O.?

A. Yes, sir, they have one that is like it. They have two of the other type, but their new barge is a duplicate of this barge.

Q. How recently have they built that?

A. About 18 months. They have been chartering our barges for several years.

284 Q. The old type of barge had what you call the bridge?

A. Superstructure, commonly spoken of as the bridge.

Q. That is where the captain of the barge and the pilot stay?

A. The navigators, and where the crew live.

Q. And on the old style barge that bridge was supported by—what do you call those things?

A. Uprights.

Q. Attached to the sides of the barge?

A. Sides and center, and both of these are supported from the outside of the barge.

Q. In order to make the change, which has been made, so as to support this bridge, as it was supported on the barge at the time of the accident——

A. It is yet——

Q. —you had to put this arrangement in these center tracks?

A. Yes, sir.

Q. Before that the barge had been constructed so that the support would have been sufficient without?

A. We had the stanchions, instead of the 12 inch guys, as at present.

285 Q. They gave plently of space between those tracks for a man to climb on the sides, without danger?

A. No, the barges were narrower than they were in this different type of barge, these were old wooden barges, and they were designed different from this barge.

Q. How much wider is this barge than the old style barge you are talking about?

A. 2 feet.

Q. Two feet?

A. I think so.

Q. How much wider could it be?

A. I beg your pardon.

Q. How much wider could it be?

A. You could imagine, from the width of the barge, to almost unlimited width, I suppose, if it is not confined to that particular work, but we have the barge arranged to meet the requirements of our work, and the new barge is one foot wider.

Q. You could build it ten feet wider?

A. I doubt if it could be handled successfully.

Q. Suppose you did not make it 10 feet, but 3 feet, that would add 2 feet to the one you are building now?

286 A. Yes, sir.

Q. You do not think that would interfere with the operation of the barge, do you?

A. It would not make it prohibitive. It would not affect that as we would have the bridge amidship, clear.

Q. The narrower the barge the easier it is to run?

A. To a certain width.

Q. So that when you widen the old barge to the width of the present barge you have to get more water resistance?

A. We also lengthened it at the same time from 240 to 345 feet.

Q. Are you going to lengthen the new barge?

A. 20 feet.

Q. If you lengthen the barge proportionately to the widening, you have got practically the same conditions, only a more commodious barge?

A. That is easy to see.

Q. There is really no reason why a barge could not be easily constructed to put some space between the tracks, to keep them from crushing anybody?

A. There is nothing to prevent widening the barge, but, however, there is no reason why we should crush anybody. We run about 2,000 barges through, and this is the first man that we have crushed.

287 Q. There always has to be a first one. These accidents have always got to start with somebody. Do you know how many times they run the Atlantic & Danville without switch lights?

A. I did not know anything about that, but I know that they had an accident at one time.

Q. That may be so, but it was a pretty good old road, and you could say it was perfectly safe, and they had been running without switch lights for a long time, but they ran into this open switch and

killed a man, and they said just what you say now, that they had not killed one before?

A. There was no occasion for killing this one on this occasion.

Q. No occasion, but they seem to kill them just the same. Now, what was the other barge you mentioned that operated like this?

A. The New York, New Haven and Hartford, and the Pennsylvania has some three track barges.

Q. How wide are they between the tracks?

A. About somewhere like ours, just about like ours.

Q. Have you measured them?

A. No, but I have seen them, looking from the outside. I have looked them over.

288 By Judge WILLCOX:

Q. Have you seen them loaded?

A. Yes, sir; the difference in theirs the center tracks diverge out into the side track like our old one did. It converges out in the side track, and the cars run close together. There is just room enough to run the cars on the barge, on the outside, some of those barges have no superstructure at all down alongside, and they have to walk on the outside, and shove the cars.

By Mr. BUFORD:

Q. The method of operating them is just as you have testified?

A. We have to have this superstructure.

Q. As a matter of fact, the only company that you can mention that operates such a barge as the one on which this accident occurred is the C. & O. Company, and they borrowed that plan from your company about 18 months ago?

A. They don't——

Q. Is not it a fact, Captain, that so far as your experience goes, the only company who operates the barge, like the one on which the accident occurred, barge No. 14 of the New York, Philadelphia & Norfolk Railroad Company is the C. & O.?

A. Exact duplicate, yes, sir.

289 By the COURT:

Q. Has that reference to the operation, or the structure?

By Judge WILLCOX: They have 4 tracks rather than 3.

The COURT: Let me understand.

A. They have them with reference to the other barges, the construction of the track.

By Judge WILLCOX: The proximity of the track.

By Mr. BUFORD: I want to show this——

By the COURT: I want to get it clear in my mind as to whether I have misunderstood him.

By Mr. BUFORD: What I wanted to bring out squarely was that this company and the C. & O. are the only ones that use the identical tracks as they are on this barge.

A. The Grand Trunk has one that runs from Kingston on the St. Lawrence, that is somewhere similar, that has three tracks, and is very similar.

By Judge WILLCOX: In order that you may understand our position I will state that the allegation of negligence is in having the tracks so close together. I have introduced this evidence to show that tracks on other barges are as close together as they are on this barge.

290 By Mr. BUFORD:

Q. And you are willing to state, from your personal knowledge, that this barge, operated by this company, and one operated on the St. Lawrence are so constructed you cannot get up on the inside without endangering life?

A. That is my opinion from looking at the barge. I never noticed it particular, to take any measurements, but I have seen the tracks as they are, and have seen it working, and that is what called my attention.

Q. How long since you saw a drawing of them?

A. It has been about three years since. It has been about two years since I saw the one on the St. Lawrence.

Q. You made no measurements?

A. No measurements.

Q. All you can testify now is that it was a similar arrangement?

A. It was a very similar arrangement.

Q. That was what you observed?

A. Yes, sir.

Q. You have no knowledge of the method, or the occasion for this company to guard against any kind of danger, if there is any danger from it?

291 A. You mean as to my knowledge?

Q. Yes.

A. None whatever. I had nothing to do with the crew, and I was simply making inspection to see what I could put in our own floating property. I had nothing to do with the operation.

Q. There is no fixed reason why you should say the barge should be just the kind of barge as No. 14 was at the time of the injury, and there is no reason why you could not have the switches, or the barge widened, or that it could not have been done?

A. Certainly.

Q. Just as easily?

A. I might be done, but she would probably not serve our purpose as well.

Q. Why would not it serve your purpose as well?

A. We have a very small harbor to operate in, and we must have the boats that can operate in that harbor, and if the boats were wider it could not be worked in the narrow channel.

Q. Are you making it larger in regard to that now?

A. There is no reason, if there was any occasion for making the barge wider, I would not disapprove of the plan.

Q. You would not?

A. No, sir.

292 Q. Is there any special reason for the construction of the middle track on the barge in close proximity?

A. So as to get by the house.

Q. To maintain the superstructure?

A. As it is shown in that photograph, it will not go by, as it is at present.

By Mr. BUFORD:

Q. You know no reason why that barge could not have been made 2 feet wider, without interfering with the construction of the bridge?

A. Only this, you would have to move the superstructure further out.

Q. In the first instance, instead of putting that there, you could have put it further in here (indicating on photograph)?

A. You would only have to locate it in a position further that way, and if the barge was made a foot wider, that would not keep the cars from hitting it.

Q. Now, in the original construction of this barge there might possibly have been extended, so as to put these two feet further apart, and the tracks down the center?

A. Yes, sir, it was a possible construction.

293 Q. And very reasonably possible construction?

A. It could have been done.

Q. Now, how wide—you state that if a car had gone 32 feet down the western track, and I take it the same would be true of the eastern outside track, the other end would interfere with the cars standing on the center track?

A. An ordinary car would just clear.

Q. And after it had gotten down that distance, and cleared the point, how wide were those tracks apart?

A. You want to know how far they were apart?

Q. Strike that long question out, and I will put it this way: What is the distance—what is the width between the western rail of the western track and the eastern rail of the western track?

A. That varies, you know, from the curve, and widens out a little bit around the house, say 50 feet forward of the house. That is where the tracks are about parallel.

Q. That is where they are parallel?

A. Practically 7 feet, or practically 6 feet.

Q. Between the two inner rails?

A. Yes, sir, as they go back they get wider about 7½ feet.

294 Q. That is on account of the pedestal?

A. Yes, sir.

Q. The two inner rails, and the two inner tracks on the apron of the barge is 8 feet?

A. From the center of the rail to the side of the rail.

Q. Were you talking about the distance from the end of the barge up to where the inner tracks become parallel?

A. It was 25 plus 21½ at the point we measured; they were 3 inches wider.

Q. That is a good little stretch in there?

A. Yes, sir, and at that distance back they were 6 feet 3, and as I remember it.

Q. How far is it from the outside rail of the outside of the barge—do you mean the iron structure, or the wooden guard?

By Mr. PETERSON: The space to walk.

A. I have figured that as three inches, about half way to the other end of the barge to the house—4 feet 3.

Q. 4 feet 3 inches?

A. Yes, sir, and the house 6 inches less.

Q. Between the rail and the side?

295 A. From the center of the rail to the outside rail measured, there is just barely room enough to walk around.

Q. How many roads coming to New York use barges, do you know?

A. I think, as far as I have been able to observe, that those coming to Norfolk are a different type from those we have.

Q. The barges crossing the North River, and around in New York harbor?

A. Yes, sir, but they, as a general rule, are like the barges of the Norfolk Southern, and Seaboard. They use two tracks 8 to 12 feet apart where they enter the barge, about 12 with the platform in between. That is the ordinary structure of the harbor delivery barge. You will find that in every instance where the barges are built like that, you will find them about 8 feet. In the New York harbor they have two standards, I think one 8, and the other 9. We had one sent from our harbor, and another from New York, and they had different tracks, but about the same bridge.

Q. You have said you are not familiar with any other barge but yours?

A. No, we are pioneers I believe, in this barge business.

Q. You have this converging track construction?

296 A. I don't know about that. We are the pioneers, I think, with the four tracks. I think probably there were three ahead of us. When we got the Canton from New York she had three tracks.

Q. You are speaking of the steel construction?

A. We had the four tracks in that construction too.

Q. The fact of it being a steel barge does not necessitate location of the tracks in any particular way?

A. No, that has nothing to do with it.

Q. Nothing to do with the location of the tracks?

A. No, there are several boats on the St. Lawrence, with tracks like ours, but I have never seen them. I have been in the office, but I have never seen them, and of course, I could not testify.

Redirect examination.

By Judge WILLCOX:

Q. How long has No. 14 been in service?

A. I think 7 or 8 years, something like that.

Q. How many round trips per day has she averaged during that time?

A. I could not tell you. We average a little over 100 trips a month.

Q. Each barge?

A. That is in commission.

297 Q. Don't bother about that, if you don't run them, or don't handle them. When you say that you make over 100 round trips, that means carrying on an average 28 cars?

A. Yes, sir.

Q. Has loaded and unloaded 28 cars?

A. 28 at Port Norfolk.

Q. She has?

A. Yes, sir.

Q. That makes an average of 100 per month?

A. Yes, sir.

Q. 100 trips?

A. Yes, sir.

Q. How many barges of that same type in the service?

A. Nine.

Q. Have they been in the service as long, or longer than No. 14?

A. Some have been longer, and some not so long.

Q. And average about the same?

A. I think some of the barges are older than that, I think there are about 13 or 14, and barge 8 and 13.

Q. During that time you have had two accidents, other than the Baugham accident?

A. Yes, sir.

298 Q. That has been the result of your actual experience on the barge as arranged?

A. Yes, sir.

Q. Do you know any reason, for the good of the service, or otherwise, why the space between those two tracks should be widened or increased?

A. I know of no reason. We tried to work out a plan to get them closer together, and took the frog off the barge, and put them on the bridge, and tried to narrow the center track to accommodate it, but we could not do it.

Q. Taking your experience, as detailed, your familiarity with the planning of other barges, and their construction, is there any barge arrangement of track, upon the deck, as reasonable, and as safe, as this, that can be made, in the exercise of ordinary care?

A. What is that question?

(Question read.)

Q. I will change the question. It is not clear. Considering the familiarity you have with the selection, and experience in the service, and handling of barges, and in the construction of them, please state whether or not, for the service as it is arranged on the barge, is that a reasonably safe barge?

A. Yes, sir.

299 By Mr. BUFORD: We don't think what is ordinary care is a question for the witness to express, and he should not give his

opinion, but it is a question for the jury to determine whether it was ordinary care.

NOTE.—The point was argued by counsel.

NOTE.—The objection was overruled, and an exception noted.

By Judge WILLCOX:

Q. You were asked about the barges you had seen in New York, and you said you had not measured them, but you had seen the cars upon them. Please state to the jury whether those cars that you — upon those barges loaded were so close together a man could not get between them without being caught by the cars and mashed?

A. I did not notice the width of them, but I observed that the cars were very close together.

Q. Were they close enough for a man to get between them?

A. Those cars are frequently left so close on the curves, that they strike in going by, and very frequently I have seen the cars strike.

Q. You said you had superintended the building of these barges, and that the plans were sent to you for your supervision and suggestion with reference to them; were those suggestions accepted
300 by the company?

A. Yes, sir. I made some recommendations with reference to the new barge.

Q. That is your position that you hold with the company?

A. I approved the plans no longer than last month for the new barge.

Q. Did you approve the plans for No. 14?

A. Yes, sir.

Q. Is there any reason, in the operation of the barge, why there should be a space left between the inner rails where people could pass to and from between the cars?

A. I know of none.

Q. Cars on the barge are not handled like on the yard, and the service does not require a man to go between to couple the cars?

A. Only the end.

Q. What is the duty of the brakeman, on the car on a barge; what does he have to do?

A. Well I can only answer that from observation.

Q. What you have seen?

A. He gets up there and sets the brakes on, and sees that the cars are properly placed on the barge. In loading a barge with 28 cars, if all are loaded cars, and nothing unusual about the cars, the
301 idea is to load them as far on the end next to the shore, and the idea is probably to trim the barge a little bit astern than the center track, and that will leave it this way on the curve, as probably there is a little room on the car, on the side track, *on the side track*, as the center track.

Q. In order that my friend may understand that, I will get away from the nautical terms: You leave the cars as near the stern as possible to put the stem low in the water?

A. Yes, sir.

Q. The barge moves better with the stem low in the water and stern out?
A. Yes, sir.
Q. And the cars can be placed as near as possible to the stern?
A. Yes, sir.

By Mr. BUFORD:

Q. Just the reverse of loading a car?
A. Just the reverse, in putting the water under the head of the car.

By Judge WILLCOX:

Q. Please state whether or not the ordinary box car, when all the tracks are filled, and close over, it is safe for a man to step from one to the other, from track to track?

A. Yes, sir. The center track is so high, if the car is what
302 we call a specially big car, it would hit the top of the car, hit on the side of the tracks. I remember last year Mr. Boyland and I went down to see if we could straighten out the center track the same width, and have them not so close together, and we found that it was impossible, because the tops of the cars would strike. There is one foot difference in the distance between the tracks in one way, and they would touch, and it would be only 18 inches space.

Q. If you had widened your barge 6 inches to the side, there would be 12 inches between the cars?
A. That is all.

The defendant rests.

The defendant having rested its case, the plaintiff, to further prove and maintain the issue on his part, introduced the following evidence:

KINDRED BAUGHAM, being duly sworn, in rebuttal, testified as follows:

Examined by Mr. BUFORD:

Q. You are the administrator in this case—the one who is bringing this suit?
A. Yes, sir.

Q. You are the brother of Richard T. Baugham, who was
303 killed in this accident?
A. Yes, sir.
Q. Do you know anything of the accident yourself?
A. Nothing at all, no, sir.
Q. Did you have a conversation with Mr. Harry Boyland, the conductor under whom your brother worked on December 29th, 1912, the day before his injury?
A. Yes, sir.
Q. Did he make any statement to you with reference to whether or not he had given your brother any warning of the dangers incident to the business?

Judge WILLCOX: I desire to object to that question, because it is seeking to contradict the testimony my friend brought out, as I stated at the time, and because I think the evidence is improper for any purpose. It cannot be possible for any purpose except for the purpose of contradicting Mr. Boyland, and I think it is inadmissible.

NOTE.—The objection was overruled, and an exception noted.

(Question read.)

A. Yes, sir.

Q. What statement did he make to you?

NOTE.—The same objection, and the same exception is noted.

304 A. He told me that he was the first man my brother worked under, and that he instructed him as to the danger so far as he could, under the circumstances. He said that he could not give him full instructions and handle the rest of the business, or attend to his work. That is about the statement he made to me in that regard. He further said that he thought if my brother could have been with him the next day- —

Judge WILLCOX: I object. That is not evidence.

The COURT: I sustain the objection. He is here to contradict the witness in a certain conversation he is said to have had with him. Mr. Boyland said nothing of this conversation.

By Mr. BUFORD:

Q. Was it at the same time?

A. At the same time, the same conversation..

By the COURT: You must confine your evidence to the warning. With reference to that part of the conversation in regard to the warning. If you go beyond that, that is not rebuttal testimony. That may have been proper testimony on behalf of the defendant, but we are now in rebuttal.

Judge WILLCOX: I suppose if Mr. Boyland had expressed an opinion as to the sufficiency of the instruction you would allow that.

Mr. BUFORD: We would like to, if your Honor please, if the court feels that we can do so, to recall Mr. Boyland. We did not
305 ask him about all of the conversation about which Mr. Baugham is now undertaking to testify. We would like to ask Mr. Boyland specifically whether he had any further conversation with Mr. Baugham.

The COURT: That would depend entirely upon the character of the testimony.

Mr. PETERSON: I would like to suggest this: Your Honor suggested just now, if this evidence is not admissible in rebuttal, I would like to ask your Honor, and it is in the discretion of the court, that you would allow us to introduce this evidence in chief.

NOTE.—The point was argued at length by counsel.

The COURT: I don't think it is admissible until you have laid a better foundation, and the question is whether you ought not to have done that in your cross examination of Mr. Boyland.

NOTE.—The point was further argued by counsel.

The COURT: The case as presented now to the court is not rebuttal testimony, and is subject to the objections made. The court will, in its discretion, give you an opportunity to further cross examine Mr. Boyland.

HARRY L. BOYLAND, recalled, for further cross-examination:

306 By Mr. BUFORD:

Q. You heard Mr. Baugham *testified* to the conversation, according to his recollection, that he had with you?

A. Yes, sir.

Q. You heard what he said; and you recall what you said on your own examination. Now, what I want to know is: Did you, or not, on the occasion of this conversation go further and say that if the young man had been with you the next day, the day he received the fatal injury, that you could have given him further instruction that would have saved him from the injury?

Judge WILLCOX: I object.

NOTE.—The objection was sustained, and an exception noted by counsel for the plaintiff.

By Mr. BUFORD:

Q. Did you, on that occasion, say that if you had been with him, or he had been working with you the next day you would have given him further instructions?

Judge WILLCOX: I object.

NOTE.—The objection was sustained, and an exception noted by counsel for the plaintiff.

307 Q. Did you, or not, say on that occasion of that conversation, that you had not completed the instructions which you would have given him if he had worked with you the next day—that you would have instructed him further with reference to the dangers of the duties which he had undertaken?

Judge WILLCOX: I object.

NOTE.—The objection was sustained, and an exception noted by counsel for the plaintiff.

The COURT: The question is not whether he would have given him additional instructions, but whether he received sufficient instruction on the day he worked with him.

The plaintiff rests.

And the said defendant says that the matter aforesaid, so introduced and shown in evidence to the jury by the plaintiff is not sufficient in law to maintain the said issue on the part of the plaintiff, and that it, the said defendant, is not bound by the law of the land

to answer the same, and doth assign the following as the grounds of this, its demurrer to the evidence in this cause, to-wit:

1. That the evidence shows no negligence on the part of the defendant.

2. That the evidence fails to show that the defendant failed
308 to furnish the plaintiff's intestate with a safe place in which to work.

3. That the evidence fails to show that the defendant did not instruct and warn the plaintiff's intestate as to the risks and dangers incident to his employment.

4. That the evidence shows that the place where the plaintiff's intestate was to perform his duties was safe, and that he was properly instructed and warned as to the dangers incident to his business.

5. That the evidence shows that the risk and danger of the accident in which the plaintiff's intestate was injured was open and obvious to a person of his intelligenece, and one of the risks and dangers which he assumed as a part of his contract of employment.

Wherefore, for want of sufficient matter in that behalf to the said jury shown in evidence, the said defendant prays judgment, and that the jury aforesaid may be discharged from giving any verdict upon the said issue, and that the said plaintiff may be barred from having or maintaining his aforesaid action against it.

NEW YORK, PHILADELPHIA & NORFOLK
RAILROAD COMPANY,
By THOMAS H. WILLCOX, *Its Attorney.*

309 In the Circuit Court of Norfolk County, Virginia.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased,
v.
NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, a Corporation.

Trespass on the Case.

Joinder in Demurrer to Evidence.

The said plaintiff says that he hath shown in evidence to the jury sufficient matter to maintain the issue on his part, and in as much as the defendant doth not deny or in any manner answer the said matter, he prays judgment, and that the jury may be discharged from giving any verdict upon the said issue.

KINDRED BAUGHAM,
Administrator of Richard T. Baugham, Dec'd,
By BUFORD, LEWIS & PETERSON,
His Attorneys.

Be it remembered that the foregoing demurrer to the evidence by the defendant in the above styled cause, and the joinder therein by

the plaintiff, were duly filed in the above styled cause in term, this 4th day of December, 1913.

310 Given under my hand and seal this 31st day of December, 1913.

J. T. LAWLESS, [SEAL.]
Judge of the Circuit Court of Norfolk County, Virginia.

To which action and ruling of the court in sustaining the said objection, the plaintiff excepted, and prays that this his fifth bill of exceptions may be signed, sealed, enrolled and made a part of the record, which is accordingly done this 30" day of January, 1914, and within thirty days from the adjournment of the court at which the final judgment in this action was entered.

J. T. LAWLESS, [SEAL.]
Judge of the 1st Judicial Circuit of Virginia.

O. K.
T. H. W.

KINDRED BAUGHAM, Adm'r, Plaintiff,
vs.
NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY, Defendant.

Plaintiff's Bill of Exceptions No. 6.

Be it remembered that on the trial of this cause, and after
311 the jury had been sworn and empanelled to try the issue joined, the plaintiff, to maintain the issue on his part, introduced the witness Kindred Baugham, the object of the introduction of said Kindred Baugham being to disclose a conversation alleged to have been had by him with a witness for the defendant, one Harry L. Boyland, to whom the following question was pronounced by the plaintiff, by counsel:

"Q. What statement did he make to you?"

To which the witness replied:

"A. He told me that he was the first man by brother worked under, and that he instructed him as to the danger so far as he could, under the circumstances. He said that he could not give him full instructions and handle the rest of the business, or attend to his work. That is about the statement that he made to me in that regard. He further said that he thought if my brother could have been with him the next day——"

To which question and answer, the defendant, by counsel, objected, which objection, being sustained by the court, the plaintiff, by counsel, excepted. As fully appears from the demurrer to the evidence by the defendant, which includes the evidence, *and* which is hereby referred to and made a part of this bill of exceptions.

312 To which action and ruling of the court in sustaining the said objection, the plaintiff excepted, and prays that this his sixth bill of exceptions may be signed, sealed, enrolled and made a part of the record, which is accordingly done this 30" day of Jan-

uary, 1914, and within 30 days from the adjournment of the court at which the final judgment in this action was entered.

J. T. LAWLESS, [SEAL.]
Judge of the 1st Judicial Circuit of Virginia.

O. K.
T. H. W.

STATE OF VIRGINIA,
County of Norfolk, To wit:

I, Alvah H. Martin, Clerk of the Circuit Court of Norfolk County, State aforesaid, do hereby certify that the foregoing is a true transcript from the records in the case named. I further certify that said transcript was not made up and completed until the defendant had due notice of the making of the same, as required by law.

Given under my hand this 14th day of March, in the year 1914.

ALVAH H. MARTIN, *Clerk*,
By CORA P. PARKER, *D. C.*

313 In the Supreme Court of Appeals of Virginia, at Richmond.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased,
against
NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

I, H. Stewart Jones, Clerk of the said Court, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this case.

Witness my hand and the seal of the said court, this 1st day of December, 1914.

H. STEWART JONES, *Clerk.*

I, James Keith, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify, that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 1st day of December, 1914.

JAMES KEITH, *President.* [SEAL.]

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said court, this the 1st day of December, 1914.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES, *Clerk.*

314 KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased, Plaintiff in Error,

v.

NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY, Defendant in Error.

It is hereby stipulated and agreed between counsel for the parties to this cause, that in printing the record for the Supreme Court of the United States, the following portions of the petition presented by the plaintiff in error to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas, shall be omitted, to-wit:

(1) From and including the words "The Facts," on page 3 down to, but not including the words, "The first assignment of error," on page 31.

(2) From and including the words, "The negligence of its officers, agents and employees," on page 32, to the end of page 57, inclusive.

(3) The paragraph on page 59 commencing, "We, of course, realize," etc.

(4) From and including the paragraph on page 60 commencing, "In Choctaw v. McDade" etc., down to, but not including, the words, "other assignments of error" on page 67.

Given under our hands this 14th day of April, 1915.

EDWARD P. BUFORD,
Attorney for Plaintiff in Error.
FRANCIS L. GOWEN,
For Def't in Error.

[Endorsed:] 774/24,518.

315 The following is the portion of the petition for the writ of error presented to the Supreme Court of Appeals of Virginia, in the case of Kindred Baugham, Administrator of Richard T. Baugham, deceased, v. New York, Philadelphia and Norfolk Railroad Company, which is to be printed as a part of the record in the Supreme Court of the United States.

The rest of the petition is not to be printed, in accordance with the stipulation of counsel.

316 To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Kindred Baugham, Administrator of Richard T. Baugham, deceased, respectfully represents that he is aggrieved by a final judgment of the circuit court of Norfolk county, rendered on December 4, 1913, in a certain action at law lately pending in said court, under the style of Kindred Baugham, Administrator of Richard T. Baugham, deceased, v. New York, Philadelphia and Norfolk Railroad Company, wherein your petitioner as such administrator was plaintiff, and the said New York, Philadelphia and Norfolk Railroad Company, a corporation, was defendant; a transcript of the record of the judgment is herewith presented as a part of this petition.

Statement of the Case.

This is an action of trespass on the case brought by your petitioner under the provisions of the act of Congress, approved April 22, 1908, known as the Federal Employers' Liability Act, as amended, to recover of the defendant damages for the wrongful death of his intestate.

It was admitted that the defendant at the time of the injury was engaged in interstate commerce; that the intestate was employed by it in such commerce; and that your petitioner was entitled to sue under said act (R. 70).

The declaration charges the defendant with liability upon either or both of two grounds: (1) that the injury to the intestate was due to the dangerous manner in which the tracks of the defendant were arranged and located on its barge upon which the injury occurred, as hereinafter stated; and (2) that the defendant through its officers, agents and employes, was guilty of negligence in failing to duly instruct and warn the intestate as to the dangers to which he was exposed in the performance of the duties to which he was assigned upon said barge.

317 On the trial, the defendant demurred to your petitioner's evidence, and the jury, subject to the ruling of the court on the demurrer, assessed your petitioner's damages at $10,000.00; but the court, by the judgment complained of, sustained the said demurrer to the evidence, and adjudged that your petitioner take nothing by his suit, and that the defendant recover of him its costs in that behalf expended (R. 54). The court during the progress of the trial committed other errors to the prejudice of your petitioner in the admission and exclusion of evidence, which rulings are more specifically referred to hereafter in the assignments of error.

* * * * * *

The First Assignment of Error.

Your petitioner is advised that the judgment complained of is erroneous and assigns the following error therein:

1. The court erred in sustaining the defendant's demurrer to the evidence.

This assignment of error involves both grounds of liability charged in the declaration, viz: (*a*) that the injury to the decedent resulted "in whole or in part from the negligence of its (the defendant's) officers, agents and emyloyes," in failing to give him adequate warning of the danger; and (*b*) that the injury resulted "in whole or in part, from a defect or insufficiency, due to its negligence, in its tracks, roadbed, boats and equipment," within the purview of the first section of the act of Congress.

The demurrer to the evidence can not, under repeated decisions of this court, be properly sustained unless the evidence can be said to be "so certain and incontrovertible" as to preclude a difference of opinion among reasonable men as to whether the imputation of negligence in either aspect, is fairly warranted.

* * * * * * *

Assumption of the Risk.

318 With respect to the doctrine of assumption of risk, we submit these two propositions:

1. That this common law defense is not available to defeat liability created by the act of Congress, (*a*) because the common law does not exist in Virginia as a part of the federal jurisprudence; but only by virtue of its statutory adoption by the state and to the extent that it has not been repealed; (*b*) because the common law defense of assumption of risk of an abnormal danger due to negligence, has never existed in Virginia except by virtue of the statutory adoption by the state of the principles of the English common law (Code § 2); (*c*) because this common law defense has been repealed in Virginia by constitution and statute, and therefore does not exist as a rule of decision in this state; (*d*) because the act of Congress is independent of, and supersedes, the law of the state upon the subject, and can not be "pieced out" for the purpose of creating a liability or giving rise to a defense, either by the remedial legislation embodied in the constitutional or statutory provisions of the state, or by the statutory adoption by the state of the common-law (Code § 2), which to the extent that it made this common law defense a part of the law of the state, has been repealed; (*e*) because, just as the employe can not resort to the constitution and statute of the state, abolishing the defense of assumption of risk, the employer can not resort to the statute of the state adopting the English common law, and for the stronger reason that to the extent of the defense of assumption of the risk, the common law and the statute adopting it have been repealed; and (*f*) because such a principle as that by which, at common law, the master under the doctrine of assumption of risk was exempted from liability for his own negligence, or that of the fellow servants of the injured employe, simply nullifies the policy and specific provisions of the act.

2. That even at common law the doctrine of assumption of risk would not defeat recovery in this case:

(*a*) The common law principle by which the employe was held to have assumed as a risk of his employment the danger of
319 injury from the negligence of a fellow servant (N. & W. Ry. Co. v. Nuchols, 91 Va. 193; Schlemmer v. Buffalo, 208 U. S. 1), has been "displaced" by the act of Congress, Mondou Case, 223 U. S. 1; and the duty to warn being non-assignable, the employes to whom it is delegated are thereby made vice-principals.

(*b*) At common law, the decedent can not be charged with assumption of risk, so far as the case is based upon a "defect or insufficiency" in physical appliances. He did not know or appreciate the danger, nor can he be charged, as a matter of law, with constructive knowledge of the danger.

* * * * * * *

Other Assignments of Error.

2. The court erred in permitting the defendant to introduce as evidence the testimony of its witness Richardson, set out in petitioner's bill of exceptions No. 1 (R. 59).

3. The court erred in permitting the defendant to introduce as evidence the testimony of said witness set out in petitioner's bill of exceptions No. 2 (R. 61).

4. The court erred in refusing to permit counsel for petitioner to propound to defendant's witness H. L. Boyland, the question set out in petitioner's bill of exceptions No. 3 (R. 63).

5. The court erred in refusing to permit petitioner's counsel to proppound to said witness the question set out in his bill of exceptions No. 4 (R. 65).

6. The court erred in refusing to permit your petitioner's counsel to propound to said witness the question set forth in his bill of exceptions No. 5 (R. 67).

7. The court erred in the ruling set forth in its bill of exceptions No. 6 (R. 214).

As will appear from the transcript of the evidence (R. 206), referred to in the bill of exceptions, the defendant's objection, which was sustained by the court, was to allowing the witness to
320 complete the sentence "He further said he thought if my brother could have been with him the next day——." The ground of this ruling was that Boyland had been examined about what warning had or had not been given, but not about what he said would have been done if the decedent could have been with him the next day.

For these and other errors apparent upon the fact of the record, your petitioner prays a writ of error and supersedeas to the judgment aforesaid, and that the same may be reviewed and reversed by this Honorable court.

As, as in duty bound, he will ever pray, etc.

Respectfully submitted,

KINDRED BAUGHAM,
Administrator of Richard T. Baugham, Deceased,
By COUNSEL.

BUFORD, LEWIS & PETERSON,
Attorneys for Petitioner.

VIRGINIA,
Brunswick County, To wit:

We, E. P. Buford and M. R. Peterson, attorneys at law practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion the judgment complained of in the foregoing petition should be reviewed and reversed by said Supreme Court of Appeals.

Given under our hands this 4th day of June, 1914.

E. P. BUFORD.
M. R. PETERSON.

321 [Endorsed:] 774/24518.

[Endorsed:] File No. 24,518. Supreme Court U. S. October term, 1914. Term No. 774. Kindred Baugham, Administrator, etc., Pl'ff in Error, vs. New York, Philadelphia & Norfolk Railroad Company. Stipulation to omit parts of record in printing. Filed April 23, 1915.

Endorsed on cover: File No. 24,518. Virginia Supreme Court of Appeals. Term No. 327. Kindred Baugham, administrator of Richard T. Baugham, deceased, plaintiff in error, vs. New York, Philadelphia & Norfolk Railroad Company. Filed January 18th, 1915. File No. 24,518.

Office Supreme Court, U. S.
FILED
MAR 14 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

KINDRED BAUGHAM, ADMINISTRATOR OF RICHARD T. BAUGHAM, DECEASED,

v.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

No. 327.

ON WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD P. BUFORD,
Counsel for Plaintiff in Error.

APPEALS PRESS, INC., RICHMOND, VA.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

KINDRED BAUGHAM, ADMINISTRATOR OF RICHARD T. BAUGHAM, DECEASED,

v.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

No. 327.

ON WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action under the Employers' Liability Act of April 22, 1908, as amended by the act of April 5, 1910. It was brought in the Circuit Court of Norfolk county, Virginia, to recover of defendant in error damages for the wrongful death of plaintiff's intestate.

THE FACTS.

The intestate was born on March 14, 1893 (Record p. 37). Before entering the employment of defendant he had had no experience in railroad service, which fact was known to the defendant (Record p. 80) and expressly stated in the application for employment (Record pp. 73-74). He had worked in a drug-store at Port Norfolk and more recently had done some work as a carpenter. The idea of engaging in railroad service did not originate with him. J. C. Hubbard, 'special officer' of the defendant, 'suggested to him to apply for this employment' as Conductor Boyland had said he wanted some good young man (Record p. 91).

He signed the application for employment on the evening of Saturday, December 28, 1912, but was not called for duty until after he had dressed for church the next morning. He was immediately assigned to the hazardous task of assisting, as leading brakesman, in transferring cars from the railroad yard at Port Norfolk to the railroad barge. Early on the following morning, December 30, 1912, while engaged in this service on barge No. 14, he received the injury and died the next day.

There were four tracks on the barge. Between the outside and center tracks was sufficient space for an employee to climb the side ladders in safety between cars moving on those tracks (Record pp. 101-108). There was also sufficient space between the center tracks for some distance from where they entered the barge from the dock; but these tracks gradually converged until the space between them was so diminished that cars being moved on one center track would almost touch those standing on the other track. The roofs, at the point of greatest proximity, would sometimes touch.

Four photographs were offered in evidence by defendant, one of which—photograph No. 2—shows that this convergence of the tracks would hardly be noticed and that

the danger was a *latent* one to an inexperienced employee who had not been duly warned.

On the morning of the accident cars had been placed on the right outside and center tracks, and the engine with fourteen cars attached had been backed in upon the outside left or westward track, six of which cars were cut loose and left on the outside track and the remaining eight were pulled back upon the yard to be "shoved" in upon the left center track.

To accomplish this the switch on the dock had to be set for this center track, which was done by Conductor White, and thereupon the cars commenced being moved into the barge on the left center track.

While this movement was being made E. S. Johnson, captain of the barge, "crawled up on the car, on the side of the car by the grab-iron," to "take a ride down, it was going along so nicely" (Record p. 51). Conductor White after setting the switch likewise climbed on the car, by means of the side ladder, as it came along (Record p. 63). The intestate followed the example of these experienced men and, for the purpose of performing his duty as brakeman, attempted to climb upon the car on the same side as the conductor had done, but before reaching the top was caught and fatally injured between that car and a car standing on the opposite track at the place where the tracks converge to a point of danger.

The record is silent as to any warning to the intestate of *this specific danger*. The duty of instructing seems to have been delegated to the conductor under whom he worked the *first day*. This conductor was H. L. Boyland, who, when asked on cross-examination what warning he gave, answered: "I told him to stop, look and listen" (Record p. 81).

It nowhere appears from the record that any "officer, agent or employee" informed the intestate of the danger created by the gradual convergence of the center tracks on the barge. The record shows that they were closely

examined as to the character of the warnings they claim to have given, but not one mentioned this danger. The record shows affirmatively that he received no kind of instruction or warning at the time he entered into the contract of service; that there was no rule of the company regulating the manner in which this service was to be performed; that the duty of instructing was delegated to the conductors—that is, to the one having a new man under his control the first day of his experience—one day, under the system improvised by the conductors, in the absence of rule or regulation, apparently being regarded by them as sufficient; and that it was the practice not to tell a "green brakeman," but to "show" him as the work progressed (Record p. 89), and, presumably, to leave him *uninstructed as to any matter or situation not arising or to be confronted during the progress of the first day's work.*

The intestate was not called for service on Sunday, December 29, 1912, the first day of his experience, until after the work of loading the barge had been commenced. At that time the conductor was busy. His testimony shows that the time and circumstances of intestate's entering the service made little impression on him (Record p. 86-7). Busy directing the work already in progress, and following a practice of not "telling verbally," but "showing" as the work progressed, the inference is that the conductor did not have the time or occasion to give the intestate the full and specific instructions to which his lack of experience and the perils of his environment entitled him. And that is the explanation Conductor Boyland gave the plaintiff immediately after the accident:

> "He told me that he was the first man my brother worked under and that he instructed him as to the danger so far as he could under the circumstances. He said that he could not give him full instructions and handle the rest of the business, or attend to his work. That is about the statement he made to me

in that regard. He further said that he thought if my brother could have been with him the next day—" (Record p. 105).

The non-committal, evasive and inconclusive testimony by which defendant seeks to prove its performance of this non-delegable duty discloses the fact that not a single witness intimates that he at any time called the decedent's attention to the fatal danger to a person who during the progress of work upon the barge might be surprised and caught between cars upon the center tracks. Not a caution or warning from an officer, agent or employee of the defendant apprised this inexperienced youth of the impending danger.

The construction of the barge rendered the operation of loading and unloading cars intricate and dangerous. The danger consisted not in an occasional detail arising inopportunely and without anticipation in the course of the work, but in an ever-present hazard peculiarly menacing to an inexperienced servant. A simple and specific caution, directing decedent's attention to the situation of the tracks and the danger which they involved, would have averted the injuries which caused his death.

It is a fact agreed that the case comes within, and is therefore controlled by, the provisions of the act of Congress (Record p. 36).

The Proceedings.

The declaration charges the defendant with liability on two grounds: (1) That the failure to warn the decedent of the danger which caused the injury was negligence on the part of its "officers, agents or employees," and (2) that the convergence of the tracks on the barge was a "defect or insufficiency" due to its negligence in its track, roadbed, barge and equipment.

On the trial the defendant demurred to the evidence. The grounds of the demurrer, stated in writing in accordance with the statute of the state (Acts General Assembly of Virginia, 1906, chapter 177):

> "1. Be it enacted by the general assembly of Virgina, That in all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered. After joinder in demurrer no other evidence shall be admitted and a non-suit shall not be allowed,")

are as follows (Record p. 107):

> "1. That the evidence shows no negligence on the part of the defendant.
>
> 2. That the evidence fails to show that the defendant failed to furnish the plaintiff's intestate with a safe place in which to work.
>
> 3. That the evidence fails to show that the defendant did not instruct and warn the plaintiff's intestate as to the risks and dangers incident to his employment.
>
> 4. That the evidence shows that the place where the plaintiff's intestate was to perform his duties was safe, and that he was properly instructed and warned as to the dangers incident to his business.
>
> 5. That the evidence shows that the risk and danger of the accident in which the plaintiff's intestate was injured was open and obvious to a person of his intelligence, and one of the risks and dangers

which he assumed as a part of his contract of employment."

The jury, by the conditional verdict returned December 4, 1913, assessed the plaintiff's damages at $10,000.00; but the circuit court sustained the demurrer and rendered judgment for the defendant (Record pp. 30-1).

The plaintiff presented to the Supreme Court of Appeals of Virginia his petition for a writ of error and *supersedeas* to the judgment of the circuit court (Record pp. 110-113); but the court, by its final judgment rendered on September 4, 1914, refused "the said writ of error and *supersedeas* asked for, which refusal doth in effect affirm the judgment of the said Circuit Court of Norfolk county" (Record p. 9).

The case is in this court on a writ of error to the judgment of the Supreme Court of Appeals of the State of Virginia.

The questions for the determination of this court are:

1. Whether the evidence sustains the charge of negligence on the part of defendant's officers, agents or employes in failing to instruct and warn the decedent as to the danger which caused his injury and death.

2. Whether the evidence sustains the charge that the convergence of the center tracks on the barge was a "defect or insufficiency," due to the negligence of the defendant, in its tracks, roadbed, barge or equipment.

3. Whether the decedent assumed the risk of the danger which resulted in his injury and death.

These questions arise upon the defendant's demurrer to the evidence and upon the action of the Supreme Court of Appeals in affirming the judgment of the circuit court sustaining the demurrer.

SPECIFICATIONS OF ERROR.

On behalf of the plaintiff the following errors are assigned:

1. The Supreme Court of Appeals erred in affirming the judgment of the Circuit Court of the county of Norfolk sustaining the defendant's demurrer to the evidence.

2. The Supreme Court of Appeals erred in refusing to reverse the said judgment of the circuit court and render judgment for the plaintiff for $10,000.00, the damages assessed by the jury, with interest thereon from December 4, 1913, and costs.

ARGUMENT.

The plaintiff having asserted a distinct Federal right, the questions raised by the defendant's demurrer to the evidence are open to review in this court. *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668; *Carlson* v. *Curtis*, 234 U. S. 103; *Southern P. Co.* v. *Schuyler*, 227 U. S. 601; *Creswell* v. *Knights of Pythias*, 225 U. S. 246; *St. Louis & I. M. R. Co.* v. *McWhirter*, 229 U. S. 265; *Chicago, &c. R. Co.* v. *Devine*, 36 Sup. Ct. Rep. 27.

The rule of decision on demurrer to evidence, under the practice in Virginia and generally in states where the practice obtains, is fairly indicated by the following judicial statements:

> "By the demurrer to the evidence, the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence whch conflicts with that of his adversary, and all inferences from his own evidence which do not necessarily result therefrom." *Johnson* v. *Chesapeake & O. R. Co.*, 91 Va. 171; *University of Virginia* v. *Snyder*, 100 Va. 577.
>
> "Where reasonably fair-minded men might differ

about a question, such question must be decided against the demurrant, on a demurrer to the evidence." *Bass* v. *Norfolk, &c. R. Co.*, 100 Va. 1.

"Upon a demurrer to the evidence the court is required to make all the presumptions in favor of the verdict that a jury might have made had not the case been withdrawn from it." *Simons* v. *Southern R. Co.*, 96 Va. 156.

Similar rules of decision are applied by this court:

"A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom. *Parks* v. *Ross*, 11 How. 373." *Schuchardt* v. *Allen*, 68 U. S. 359, 17 L. ed. 644.

"By this demurrer, the defendant has taken the questions of fact from the jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of adjudged cases on this subject is very strong to show that the court will be extremely liberal in their inferences, where the party, by demurring, will take the question from the proper tribunal." *The Bank of the United States* v. *Smith*, 11 Wheat, 180, 6 L. ed. 446.

"The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably

draw the court ought to draw." *Pawling, et als.*, v. *The United States*, 4 Cranch 222, 2 L. Ed. 219.

"The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove." *Young* v. *Black*, 7 Cranch 568, 3 L. Ed. 565.

While the plaintiff is entitled to the benefit of these principles, the strength and merit of his case do not depend upon the inexorable rules of law which they establish. His case is affirmatively sustained by the preponderating force of the facts proved.

Inferences of Fact.

We submit the following propositions as warranted by the evidence:

1. *That such instruction as was actually given intestate had reference to the manner in which he was to "pass the signals" and do other work, rather than to the dangers to be avoided by him.*

Conductor White, under whom he was working at the time of the accident, testified as follows:

"Q. Did you give him any instruction as to what dangers would arise from the service to be performed by him? A. Well, no I didn't exactly on account of he had been working the day before. I generally give the instructions the first day.

"Q. So you did not give him any? A. Only the working of the barge, after I started to work the barge I give instructions from the barge.

"Q. Instruct what to do, not what dangers to avoid, but what to do as a brakeman? A. Yes, sir.

* * * * * * * * *

"Q. You did not on that occasion, in running the barge give him any kind of instructions as to what

the dangers were, but told him what you wanted done? A. I told him what I wanted done" (Record 69).

2. *That the instruction, claimed to have been given, that he should remain on cars on the barge and steps across to cars moving on adjacent tracks, likewise had for its object the "passing of signals."*

On this subject Conductor White further testifies:

"Q. Do you definitely recall now having warned, or having told Baugham to walk from one car to the other with*ing* (out) coming to the ground? A. Yes, sir, I told him when he was on top, to step from one car to the other, and not to get down, that there was no necessity for him to do it, but to stay on top to pass signals.

"Q. You told him that it was necessary for him to stay on top to pass signals? A. Yes, sir.

* * * * * * * * *

"Q. Now, you say, Mr. White, that that was the rule; will you tell us who made that rule? A. It was the rule of the yard.

"Q. Who made it? A. The company, I suppose.

"Q. Have you got any rule book? A. Have I?

"Q. Yes. A. No, I haven't any rule book.

"Q. Have you got any rule book that says that a brakeman must step across the space between the one track and the other? A. That is our instruction we give the men down there to do the work. It is not in the rule book. We haven't got any—in other words, it is not in the rule book, but is the way we instruct our men to do the work.

"Q. That is to say, it is the way you conductors tell the men how to do? A. We instruct our men not to get down on the ground, but to stay on top.

"Q. To stay on top because they have to give the signal? A. Give the signal, yes, sir" (Record p. 69).

3. *That the testimony of Conductor Boyland, under whom intestate worked the first day, discloses that no adequate warning was given by him. Besides, laboring as he was under the embarrassment occasioned by an attempt on his part to testify on the trial in conflict with the statement made by him to the plaintiff, his testimony is not such as to be entitled to the credence of the jury.*

On his examination in chief, he made these general statements:

"Q. Did you have any conversation with him, or instruct him as to his duty, and as to the requirements of the work of a brakeman? A. I did.

"Q. Did you go into it fully with him? A. Yes, sir.

* * * * * * * * *

"Q. Now, you say you instructed him as to the dangers of the business and as to his duty? A. Yes, sir" (Record p. 79).

On cross-examination, he gave this testimony:

"Q. You were asked if you gave the young man instructions; what did you tell him? A. I told him most everything I could tell him, in fact. I took him and showed him, and went with him and showed him.

"Q. Showed him what? A. How the work was done, and the danger attached to it.

"Q. What dangers are you talking about? A. Well, principally getting on and off the cars while in motion on the barge, and in the pilot house.

"Q. What did you tell him about getting off and on? A. I told him not to do it under no circumstances, except on the leading car on the end ladder.

* * * * * * * * *

"Q. What else did you tell him? A. I told him everything I could tell him.

"Q. We are just asking you to tell what you did tell him? A. It has been over a year ago.

"Q. It would be right hard for you to recall? A. To recollect the exact words I told him.

"Q. I am not asking you the exact words; I am not asking you something impossible, but I am asking you what you told him; it is so indefinite to say you told him everything that you could tell him? A. I told him all I could tell him about the work.

"Q. About the work? A. Yes, sir.

"Q. If you know now you told him all you could tell him, you ought to know the substance of what you told him? A. I went right along with him, and I told him the different phases of the work as we went along, and I went right with him to show him what to do, and how to do it, and how to take care of himself, and how to conduct himself.

"Q. How did you tell him to take care of himself? A. I told him to stop, look and listen.

"Q. Stop, look and listen? A. Yes, sir.

"Q. What were the instructions you gave him with reference to taking care of himself? A. I told him to take care of himself, and look what he was doing.

"Q. Recall some of the words you told him? A. I can't do that now" (Record p. 81).

It will be observed that the witness testified in most general terms as to the *effect* of the instructions which in his testimony he claims to have given.

In *Collins* v. *Greenfield*, 172 Mass. 783, 51 N. E. 454, Judge (now Mr. Justice) Holmes, said:

"A portion of the answer in the deposition of * * * the superintendent to the effect that he cautioned Collins about the dangers of the work was

excluded, no doubt, on the ground that it undertook to give the effect of what was said, rather than the substance of the words which he used."

In this case, so far as Conductor Boyland endeavored to give either his words or their substance, the only warning he could recall was the senseless one to "stop, look and listen."

4. *That the demeanor of Conductor Boyland as a witness was such as to discredit him under the demurrer to evidence rule.*

Further cross-examination developed this exhibition of reluctance to tell what, after much hesitation, he admitted to be the truth:

"Q. Do you mean to say you never saw a man get on a car in motion on the barge? A. I don't mean to say that.

"Q. Let's see how close we can get together. You won't deny you saw men get on the cars in motion on the barge? A. I won't affirm it.

"Q. Will you deny it? A. (Pause).

"Q. Will you deny it? A. If I denied it I would be affirming it.

"Q. What will you do then; it is up to you; take your choice? A. I can't deny it and tell the truth.

* * * * * * * * *

"Q. We want to know the truth in this case; don't have any apprehension about telling the truth? A. I am not.

"Q. So you cannot deny that men did get on the cars on the barge, the train men, while the cars were being moved? A. (No answer).

"Q. Have you answered that question? A. No, sir.

'Q. Won't you answer it, please? A. Put that question again.

"(Question read).
"A. No." (R. p. 82.)

In *Aragon Coffee Co.* v. *Rogers*, 105 Va. 51, the court overruled a demurrer to the evidence upon the sole ground that the demeanor of the witness upon the stand, without any contradicting evidence, would have warranted an inference by the jury that he was not a *bona fide* holder of the note in litigation.

5. *That the fact that the intestate was not adequately warned appears from the following further testimony of Conductor Boyland on cross-examination* (Record pp. 86-7):

"Q. What time did he commence to work the morning you had him? A. I don't remember that.

"Q. Had the work begun when he got there or not? A. Yes, sir.

"Q. It had begun? A. Yes, sir, how long it had been in progress I don't remember now.

"Q. What caused Mr. Baugham to come there that morning? A. I don't know what caused him to come unless they sent for him.

"Q. Unless who sent for him? A. I don't know.

"Q. Will you tell the jury now what is your first recollection of having seen Mr. Baugham the morning that you worked him? A. He came to me and said he had been sent to me, and I took him in hand, and started right on with him.

"Q. Did you know previously he had been employed? A. No, sir.

"Q. You got your first information that he had been employed to work on the road from the fact of his coming to work that morning? A. He told me he had been sent to me.

"Q. Up to that time you knew nothing about his employment? A. No, sir.

"Q. You had not heard anybody mention his name? A. No, sir.

"Q. Had anybody turned him over to you there to instruct him? A. No, sir.

"Q. You had no directions from anybody to give him any instruction? A. He knew that comes with the conductor. That is standing instruction for the conductor, to instruct him.

"Q. That is standing instruction for the conductor to instruct him? A. Yes.

"Q. Where were you when you first saw him that morning? A. I don't remember now.

"Q. Were you on the barge? A. I was not on the barge.

"Q. Were you on the dock? A. No, sir, I don't think—no, I was not working the barge when he got there.

"Q. You were not at either one of those two places, but you don't know where you were? A. No, sir.

"Q. You know what you were not doing, but you don't know what you were doing? A. I could have been doing a thousand different things.

"Q. You know one or two of the thousand things you were not doing, but you cannot remember what you were doing? A. I know I was not on the barge, but I can't remember what I was doing.

"Q. Were you busy that day? A. I don't remember now.

"Q. Where were you when you gave him the instruction? A. I gave him instruction wherever we should happen to be, wherever we were doing the work, I instructed him as far as that goes.

"Q. Wherever you happen to be, with the different work, whatever you happened to be doing, you would give the instruction there? A. Yes, sir.

"Q. And your instruction extended to the things

you were doing as you were doing those things? A. Yes, sir."

Conductor Boyland is the *only* witness by whom the defendant attempted to show that it discharged the duty of warning the deceased. The foregoing testimony shows the manner in which that duty was performed.

6. *That the statements of decedent put in evidence by defendant show that he came in contact with a peril of which he had been given no warning.*

F. J. Boyland, yardmaster, on behalf of defendant, testified to this conversation:

> "Q. Did you ask him anything about the accident? A. I did not ask him, but he thought I was addressing the question to him, but I hadn't any idea when I asked the question that he was conscious, or capable of answering. When I said how did it happen, he said, 'Wait a minute and I will tell you,' and after some few seconds, I don't know how long, but maybe a few seconds, he said—he raised up on his elbow and said he was going up the side of the car and either didn't notice, or didn't know that the cars were so close together, I am not sure which term he used" (Record p. 75).

J. C. Hubbard, special officer, also on behalf of the defendant, testified as follows:

> "Q. Did you go with him to the hospital? A. Yes, sir.
>
> "Q. Did you have any conversation with him? A. A little.
>
> "Q. State what he said. A. I said, 'Tommy, how in the world did you get hurt,' and he was breathing so badly he said, 'I will tell you directly,' and they put him in the ambulance, and he asked me to

> go with him, and I told him that I would, and I assisted him in, and then I said, 'Tommy, how in the world did this happen.' He said, 'I went around the car and went to crawl up on the side of the car, and got jammed with the car on the side of the track.' I said, 'What in the world were you thinking about, Tommy,' and he said, 'I was not looking' " (Record p. 90).

7. *That, under the circumstances of the case, the instinct of self-preservation repels the presumption that intestate either voluntarily or negligently exposed himself to a danger, of the existence of which he had been duly warned or had any knowledge.*

To the extent that this instinct is held sufficient to repel the presumption of contributory negligence, and for the same reason, it gives rise to the inference that the intestate was not warned of the danger.

> "We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions based on human feelings and experience that have surer foundation than that expressed in the instruction objected to." *Baltimore & P. R. Co.* v. *Landrigan*, 191 U. S. 461.
>
> "That deceased was just entering upon the verge of manhood, with the instinct of self-preservation strong within him, and not likely rashly to encounter deadly peril or great personal danger, is a circumstance not without its weight * * * to repel the imputation of negligence." *Valin* v. *Milwaukee, etc. R. Co.*, 82 Wis. 1.

Southern Ry. Co. v. *Bryant*, 95 Va. 212-21; 1 Shearman & Red. on Neg., section 111; *Northern P. Ry. Co.* v. *Spike*, 120 Fed. 44, 1 Moore on Facts, sections 554-560.

8. *That no engineering or mechanical necessity required the dangerous construction of the tracks upon the barge. Sufficient space could have been provided for the stanchions supporting the pilot house and for the safety of employees between the cars by simply making the barge a little wider.*

The arrangement of the tracks with which the barge was fitted presented no peculiar or esoteric engineering problem. The vessel is simply a steel hulk upon the deck of which are laid four railroad tracks to accommodate the freight cars in the transportation of which it was engaged.

There was no reason, either of convenience or necessity in the construction of the barge, which compelled the adoption of the device requiring the two center tracks to attain so dangerous a proximity. No technical knowledge is needed to enable either the court or jury to condemn an arrangement which permitted cars on one track to "side swipe" cars on the other. Yet that such was the case is a fact of which the defendant had notice (Record pp. 77-8).

There is no evidence in the record of any general custom among railroad companies making use of barges similar to those under consideration in respect to the degree of proximity with which the tracks upon their decks approached each other. The witness Richardson, who testified as the *quasi* expert for the defendant, had no definite information of the usage or custom of other railroads except that the Chesapeake & Ohio Railroad Company had made use on one or two occasions of the plans of the defendant. The testimony even of this witness establishes the fact that to widen the space between the adjacent tracks involved only the widening and lengthening of the barge proportionately. The only object to be subserved is convenience in navigation, and, he adds, to use his own language, "If there was any occasion for making it (the barge) wider I would not disapprove of the plan." He further testified that the widening

of the barge would only involve a change in the location of the stanchions supporting the bridge and was asked the specific question if it were not possible to make the barge wider, to which he replied, "Yes, sir; it was a possible construction" (Record p. 100).

> "Q. You know no reason why that barge could not have been made two feet wider, without interfering with the construction of the bridge? A. Only this, you would have to move the superstructure further out" (Record p. 100).
>
> "Q. If you lengthen the barge proportionately to the widening you have got practically the same conditions, only a more commodious barge? A. That is easy to see" (Record p. 97).

In point of fact the defendant had been increasing the width and length of its barges (Record p. 97).

It will be seen from the foregoing testimony that the arrangement by which the tracks on the barge were suffered to so converge as to bring cars on the one track in contact with cars on the other was unnecessary and intrinsically dangerous; and that no overruling scientific or technical reason can be urged as justifying a contrivance that gave rise to the latent and subtle danger to which the decedent was exposed.

The Duty to Warn and Instruct.

A principle sustained by the authorities, with practically no conflict, is that it is the duty of the master, who employs a servant in a place of danger, to give the servant such warning and instruction as is reasonably required by his youth, inexperience or want of capacity, and as will enable him, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself. This duty applies with respect to the ordinary as well

as extraordinary dangers of the service. When the duty exists it is not performed by merely instructing the servant *how the service should be performed* without adequate warning of the danger to be avoided; nor are vague or general intimations of danger sufficient. The warning must be given in such plain language that the servant will understand and appreciate the danger.

Where, as in this case, there is no evidence of a specific warning and the testimony relied upon by defendant is of the inconclusive character already pointed out, the question is one of fact for the jury. Indeed, with deference to the action of the Supreme Court of Appeals in refusing a writ of error, it is respectfully submitted that the defendant's failure to discharge this duty appears so plainly from the record that the jury, if the case had not been withdrawn from it, could not with propriety have returned a verdict for defendant.

The duty to warn is non-assignable at common law; but that is immaterial, since under the act of Congress the fellow-servant doctrine is displaced and the defendant is liable for any injury "resulting in whole or *in part* from the negligence of *any* of its officers, agents or employees."

Cases are numerous which sustain the principle here relied upon.

In *Louisville & Nashville Ry. Co.* v. *Miller*, 104 Fed. 124, Judge Lurton said:

> "The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation, applies as well to one whose disqualification arises from a want of that degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation, with safety to the operator, as when the disqualification is due to youthfulness, feebleness or general incapacity. If the master has notice of the dangers likely to be encountered, and notice that the ser-

vant is inexperienced, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duty."

In that case also the court further said:

"The duty of qualifying an inexperienced servant for the performance of new and dangerous duties is a personal duty of the master who is responsible for the proper qualifications of any persons to whom it is delegated, and for their negligence in failing to continue the instruction until it is completed."

See, also, to the same effect the opinion of Judge Lurton in *Felton* v. *Girardy*, 104 Fed. 127, 43 C. C. A. 439.

In *Mixon* v. *Pekin Cooperage Co.*, 170 S. W. 1163, it is said:

"It is the duty of the master to give proper instructions and to warn the inexperienced servant of patent, as well as latent, dangers, and the jury might have found from the evidence that appellant, by reason of his youth and inexperience, was ignorant of the dangers incident to his employment, and that the master, in the exercise of due care, should have warned and instructed him.

"It is true that the evidence shows, and the appellant admits, that he was directed not to pull on the staves as they emerged from the knives, and it is no doubt true that his disobedience of this direction, in concurrence with his act of striking his foot against the cleat, may have been the proximate cause of his injury. But if the jury had believed the statement made by appellant, as we must assume it would have done, a verdict having been directed, they would have found the fact to be that no reason for this direction

about pulling on the staves was given appellant, and he was not advised that it was dangerous for him to do so.

"Where the circumstances are such that the master is under the duty of warning and instructing an inexperienced servant, that duty is not necessarily performed by simply instructing the servant how to do his work, but this instruction must be accompanied by the caution that injury might result if the directions are not obeyed. This duty is recognized in many cases, and, among other cases, in the case of *St. Louis Stave & Lumber Co.* v. *Sawyer*, 90 Ark. 473, 119 S. W. 830, in which case an illiterate, inexperienced servant, 19 years of age, was injured as the result of his failure to perform his duty in the manner in which he had been directed, and in that case it was said: 'In the present case it was still a question for the jury to say, even if appellant had "instructed him in regard to the work of lacing and mending belts," as to whether he understood and appreciated the dangers connected therewith when the belt was allowed to rest on the revolving line shaft. For, while there is evidence that appellant told appellee and others to hold a belt while being laced "clear from the line shaft and the pulleys," there is no testimony that appellant instructed appellee of the specific danger in not so holding it. It can not be said, as matter of law, that a boy of the restricted knowledge and experience of appellee would understand and appreciate the danger, unless specifically advised of it.' "

In *Freedom Casket Co.* v. *McManus*, 218 Fed. 323, it is said:

"There was a conflict of testimony respecting the nature and extent of the instructions given. For the

plaintiff it was testified that the foreman gave him no warning of the dangers of the machine, and that when the injury occurred he was removing the waste strip from the side of the saw in the way in which he had been shown. For the defendant it was testified that, to have received his injury, the plaintiff must have deliberately put his hand under the guard and against the saw, and by his own negligence, therefore, contributed to or caused his own injury.

"It is a recognized principle of law that, when a servant is taken by his master from his ordinary employment and put at work that he never before had done, there rests upon the master the duty of instructing the servant with respect to the methods and the dangers of the new kind of work. In *Peters* v. *George*, 154 Fed. 634-639, 83 C. C. A. 408, Judge Gray, speaking for this court, said:

" 'The master does not insure the safety of the servant, but he does undertake that the place in which he works, and the appliances with which he works, and the conditions under which he works, shall be reasonably safeguarded. * * * It has never been doubted that a master's duty to an ignorant or inexperienced workman, indeed to any workman about to undertake more than ordinarily dangerous work, is to explain its dangerous character and give adequate caution as to its prosecution. This duty is of the absolute personal character above referred to, and is not discharged by merely intrusting its performance to a properly selected subordinate. Nothing short of actual notice of the danger to the workman who is to encounter it, with such cautionary explanation as may enable him to avoid it, will satisfy the requirement of the law, and the default of the intermediary, whether he be the highest officer in control, or merely a fellow workman of

the one exposed to the danger, is the default of the master.'

"Applying this principle of law to a situation which may reasonably be inferred from the controverted state of the testimony respecting the absence of warning and the extent of the instructions given by the master to the plaintiff as its unskilled employee, we are of the opinion that the court below committed no error in submitting this issue to the jury."

In *Wolski* v. *Knapp-Stout Co.*, 90 Wis 178, it is said:

"Ordinarily, it is within the function of the jury to apply these principles of the law to the facts shown by the testimony. It is only when the proper application is so clear as to be free from doubt that it becomes a matter of law for the court. The testimony given on behalf of the appellant certainly tends with considerable force to show that the employment upon which the deceased was engaged had elements of danger such as were not open and obvious to the inexperienced, but such as, in the absence of instruction, could be learned by experience alone; that it required at least some experience to do the work safely; that the deceased was inexperienced in the work, and was not adequately warned of its dangers. The deceased was a minor. So there is no presumption that he understood and appreciated the danger. Although there is testimony on the part of the respondent tending to show that instruction was given him, it is yet of an inconclusive character and does not clearly establish the fact. So that it can not be said that the appellant's case was without testimony fairly to establish it, nor that the facts, or the proper inference to be drawn from the facts, were clear and free from doubt. So it seems to the

court that the questions whether the deceased was adequately instructed, and assumed the ordinary risks of the employment, are not so clear, upon the testimony, as that they were matters of law for the court, but that they were questions of fact for the jury."

In *Giebell* v. *Collins Co.* (W. Va.) 46 S. E. 569, it is held:

"It is the duty of a master who sets a servant to work in a place of danger to give him such notice and instruction as is reasonably required by the youth, inexperience, or want of capacity of the servant, and, failing to do so, he is liable for the damage suffered through such neglect."

"Instructions to an inexperienced servant must be such as to enable him to comprehend the dangers of his situation and appreciate the necessity of adopting prudent methods for his protection." Wood on Master and Servant, sec. 350.

"The master must put his instruction or warning in such plain language that the employee will understand and appreciate the danger." 20 A. & E. Ency. (2 Ed.) 99. See also 26 Cyc. 1176.

"Whether the servant has been adequately instructed is primarily a question for the jury. Their findings can not be controlled or set aside where the evidence is such as to permit different inferences to be drawn from it. Nor where the evidence is conflicting as to the amount of instruction necessary to enable the servant to do his work safely; nor where the testimony offered by the defendant is of an inconclusive character." 3 Labatt's Master & Servant (2d Ed.) Sec. 1159, p. 3080.

In *Taylor* v. *Wooten*, 1 Ind. App. 188, 50 Am. St. Rep. 200, it is held that a warning to the plaintiff "that the planer is dangerous, and that he must keep away from the same while it was running," was not sufficiently specific to be made the basis of an instruction directing a verdict for the defendant, the court holding that such an instruction predicated upon such a warning "falls far short of the requirements of the law."

The duty of the master to give adequate warning when the occasion requires has been recognized in several of the Virginia cases decided before the enactment of the Federal Employers' Liability Act. *Lynchburg Cotton Mills* v. *Stanley*, 102 Va. 590 and *Low Moor Iron Co.* v. *La Bianca*, 106 Va. 83. In the latter case, after quoting what had been said in *Richmond Locomotive Works* v. *Ford*, 94 Va. 627, the court cites with approval the following statement of the law from Shearman & Redfield on Negligence:

> "The same doctrine is laid down as follows by Shearman & Redfield: 'The master must, therefore, give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business in the natural and ordinary course of affairs, though more than this is not required of him. It makes no difference what is the nature of the peculiar peril, or whether it is or is not beyond the master's control. And it is not enough for the master to use care and pains to give such notice. He must see that it is actually done. If, therefore, he fails to give such warning, in terms sufficiently clear to call the attention of his servants to a peril of which he is or ought to be aware, he is liable to them for any injury which they may suffer thereby without contributory negligence.' 1 Shearman & Redfield on Negligence (5th Ed.) Section 203.

> And in note 5 to the same section it is said: 'An employer is bound to give notice of latent dangers among which the employee is required to work, and of which the employer has knowledge.' "

In the case at bar, the duty to give specific warning is manifest from the nature of the danger created by the convergence of the railway tracks. The danger so created was a "concealed" or *latent* danger. "The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation." *Chicago &c. R. Co.* v. *Riley*, 145 Fed. (C. C. A.) 137, 7 A. & E. Anno. Cases, 327; *Wood* v. *Louisville &c. R. Co.* 88 Fed. 46.

In *American Strawboard Co.* v. *Foust*, 12 Ind. App. 421, the court said:

> "Granting that the findings show that the appellee had been sufficiently warned of the perils and dangers attending the performance of his duties, it still remains true, as found by the general verdict, that he was ignorant of the nature of his work, and of the manner of the proper performance of the same. There is nothing in the answers returned by the jury to indicate that appellee had received such instructions as he should have been given in order to understand fully the character of the work he was to perform, and the proper manner of performing the same. It may have been true, therefore, that just prior to the injury the appellee was warned 'to be careful' and 'look out for his hand;' and yet, with the reasonable exercise of his faculties, he might still have been unable to so perform his duties as to avoid the danger. Simply warning the appellee of danger generally by the appellant did not excuse the latter from pointing out the particular danger of this employment, and to so instruct the appellee as to enable

him to avoid such danger. Nor is the finding that the appellee was so warned in conflict with the implied finding in the general verdict that appellee did not receive any instructions from the appellant or its servants concerning the duties he had to perform and the dangers and hazards attending his employment, at the time of the injury. A warning to an ignorant and inexperienced man, under such circumstances, would be of little avail."

The true doctrine, it is submitted, is that the master's obligation to instruct is or is not deemed to have been adequately discharged, according as the instruction given is such as will enable the servant to comprehend the proper steps which he should take in order to guard himself against the perils of his environment. This doctrine seems to be a necessary corollary from the fact that the object of imparting information to the servant is to put him on the same footing as a servant who, in consequence of his possessing the requisite knowledge, is held to have undertaken the responsibility of protecting himself against the risks to which such knowledge relates. *Charlton* v. *Fairbanks Co.* (Vt.), 93 Atl. 463.

It is also submitted that, upon the evidence in this case, whether the defendant was guilty of negligence in failing to adequately warn the deceased was plainly a question for the jury, which the jury might, and should, have determined against the defendant; and, therefore, that the demurrer to the evidence should have been overruled and judgment entered for the plaintiff on the conditional verdict.

A Defect or Insufficiency Due to Defendant's Negligence.

The convergence of the tracks on the barge so as to bring the cars in dangerous proximity, constitutes a "de-

fect or insufficiency", due to the negligence of the defendant, for which the first section of the act imposes unconditional liability.

It appears from the testimony of defendant's witness Richardson that no engineering or mechanical necessity required this peculiar and dangerous construction. All that can be said of it is that it is a construction which the defendant chose rather than make the barge a few inches wider.

Railroad companies, like other employers, owe to their employes the duty of exercising ordinary care to provide them a reasonably safe place in which to work. They can no more justify a "defect or insufficiency" due to a negligent plan of *construction* than a supervening "defect or insufficiency" due to negligence in the matter of *maintenance.*

Since no question of engineering is involved, the doctrine announced in *Tuttle* v. *Detroit, &c. R. Co.* 122 U. S. 189, 30 L. Ed. 1114, does not apply. That doctrine does not seem to have been generally approved, and apparently was departed from in the later case of *Union Pac. R. Co.* v. *O'Brien,* 161 U. S. 451, 40 L. Ed. 766, where it is said:

> "It is the duty of the company in employing persons to run over its road to exercise reasonable care and diligence to make and maintain it fit and safe for use, and where a defect is the result of faulty construction which the employer knew or must be charged with knowing, it is liable to the employee, if the latter use due care on his part, for injuries resulting therefrom".

In *Gordon* v. *Chicago R. Co.* 129 Iowa 747, 106 N. W. 177, 41 A. & E. R. R. Cases, 646, the court thus discusses the case of *Tuttle* v. *Detroit, &c. R. Co.:*

> "We can not give our assent to the proposition advanced by appellee, that in actions of this nature

the construction of the road can not be questioned, or that 'it will not do to allow juries to inquire into questions of this character.' The only authority cited in support of the point thus made is *Tuttle* v. *Railroad*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114. In that case the majority opinion contains a few sentences which, standing alone, would appear to be in harmony with appellee's view of the law, but a reading of the entire opinion discloses that the employee who was there seeking a recovery of damages had entered into and remained in the company's service with full knowledge of the defective track on and about which he worked, and was therefore held to have assumed the risk of injury therefrom. Such being the case, the language quoted by appellee herein may be considered dictum. Moreover, the defect there complained of was in the construction of a side track, and according to many authorities railroad companies are not held to the same degree of care in respect to such tracks as they are in respect to main tracks. *O'Donnell* v. *Railroad*, 89 Mich. 174, 50 N. W. 801. Certain it is, the courts with practical unanimity hold that railroad companies constitute no exception to the general rule which requires the employer to furnish his employee a reasonably safe place to work, and that the application of such rule extends to the roadbed and safety of the track over which trainmen are required to operate their trains. If inquiry into the construction of the road can not be made by a jury because it may involve questions of engineering or mechanics or scientific or expert discussion, then, for equally good reasons, can inquiry into the reasonable safety of the place of work be suppressed in substantially every action brought by servant against master."

In *Ferren* v. *Old Colony R. Co.* (Mass.), 9 N. E. 608-611-612, the court said:

> "The evidence would warrant a jury in finding that the defendant did not provide for its servants a reasonably safe place in which to do its work, and that there was danger in moving a car by manpower in the place where this car was, by reason of its proximity to the building, and of the gradually lessening distance between the track and the building."

In *Choctaw* v. *Mc Dade,* 191 U. S. 64, 48 L. Ed. 96-100, the court said:

> "It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures, and track to be used in the operation of the road."

If the whole arrangement of a machine is defective for the purpose for which it is applied, there is a defect so as to bring it within the act, although each part may be sufficient. *Cripps* v. *Judge,* L. R. 13 Q. B. Div. 583, 53 L. J. Q. B. N. S. 517, 51 L. T. N. S. 182, 33 Week. Rep. 35, 49 J. P. 100.

The words "defect in the arrangement," used in the acts of Ontario and British Columbia, mean the element of danger arising from the position and collocation of machinery in itself perfectly sound and well fitted for the purpose for which it is to be used. *McCloherty* v. *Gale Mfg. Co.* 19 Ont. App. Rep. 117, 121. The comprehensive language of the Federal statute, "*any* defect or insufficiency," embraces a "defect in arrangement" or any other

defect or insufficiency. It embraces also a defect in engineering.

A defect importing negligence on the master's part may properly be found to exist where the appliance in question was so constructed or arranged that it was likely to cause undue hazard to a person exercising that degree of care which might be expected, whether regard be had to the special circumstances under which the appliance was to be put into operation, or to the age, skill, and experience of the particular employee who was to operate it.

The general rule is that the question of the negligence of a railroad company in constructing or maintaining a permanent structure along its track so as to injure a person on a passing train is one of fact to be determined by the jury. *C. & O. R. Co.* v. *Cheatwood*, 103 Va. 356; *C. & O. R. Co.* v. *Rowsey*, 108 Va. 632; and the same principle applies when the railroad company suffers mere temporary structures or obstructions to remain in close proximity to its tracks. *Bessex* v. *Chicago, &c. R. Co.*, 46 Wis 477; *Illinois, &c. R. Co.* v. *Thompson*, 12 R. R. Rep. 683; *McDonnald* v. *Washington*, 31 Wash. 585, 72 Pac. 481; *C. & I. R. Co.* v. *Russell*, 91 Ill. 289; *Bradburn* v. *Wabash, &c. R. Co.*, 9 R. R. Rep. 556, 96 N. W. 929.

Whether a railroad company acts from necessity in creating a certain form of structure, or whether it is negligence to use it, is for the jury to decide. Thus, where a coal chute was placed so near the track as to strike a trainman on a passing train while in the performance of his duties, it was said:

> "Whether or not it is possible to maintain a portable chute used for furnishing coal to passing engines so far away from moving trains that one on the side ladder of a box car may pass between the shed and the train was a question of fact for the jury." *Louisville & N. R. Co.* v. *Hall*, 115 Ky. 567,

74 S. W. 289; *Louisville & N. R. Co.* v. *Mulfinger*, 80 S. W. 499.

In *Smith* v. *Norfolk, &c. R. Co.*, 109 Va. 454, the court held the company liable for an injury resulting from placing a freight car dangerously near the main track. *E converso*, the construction of tracks so as to necessitate such dangerous location of cars with respect to adjacent tracks is negligence.

In *Johnson* v. *St. Paul, &c. R. Co.*, 43 Mich. 53, 44 N. W. 884, it appeared that the plaintiff's intestate while ascending the side of a box car was struck by a signal post and killed. The court said:

> "The general proposition of law applicable to this case was that the railroad company is bound to place signal posts or other structures used in connection with its road or the operation thereof at a reasonaable distance from the track so as not to be dangerous to brakemen or other employees who work in its trains; but if for any reason it is found necessary to erect or place such structures so close as to be hazardous to its employees, it is in such case its duty to warn them of the danger so they may understand the nature of the risks to which they are to be subjected and may govern themselves accordingly; and in the absence of such notice they have a right to assume that the company has performed its duty in this respect. They are presumed to have knowledge of the ordinary peril of the employment, but not of special or extra hazards, such as may arise from the unsafe proximity of signal posts, bridges, etc., of the presence of which they have not been informed, or of the dangers incident to which they have not learned."

In *Colf* v. *Chicago, &c. R. Co.*, 87 Wis. 273, 58 N. W. 408, it was held that it was a question for the jury whether a railroad company is negligent in maintaining a switch stand two feet in height and on which there is an arm projecting within 7½ inches of the gangway step of a passing engine.

In *Chicago, &c. R. Co.* v. *Howell*, 208 Ill. 155, 70 N. E. 15, it is held that the question of the negligence of a railroad company in maintaining a switch stand is properly submitted to the jury, for the reason that they are to decide whether the railroad has used reasonable care in providing safe premises and appliances.

In *Southern Pac. R. Co.* v. *Michaels*, 57 Kan. 474, 46 Pac. 938, it appeared that a brakeman while climbing the ladder of a car in the performance of his duties was knocked off and injured by a switch stand which had an arrow on top of it. This arrow, when turned, was only nine inches from the side of the car. The switch stand was placed equally distant between two tracks running side by side. The court held that the maintenance of the stand with the arrow on it was a clear case of negligence on the part of the railroad company, and that the trial court was warranted in submitting to the jury whether it was gross negligence.

In *Flanders* v. *Chicago, &c. R. Co.*, 51 Minn. 193, 53 N. W. 644, it appeared that the plaintiff was injured by striking against the overhanging eaves of a section-house which was built so close to the track that the eaves came within fourteen inches of the rungs of the ladder on the side of a passing car, and that the plaintiff had taken a position on the ladder preparatory to climbing down for the purpose of changing a switch as soon as the station was reached. It was contended that the section-house was placed at a distance so far removed from the switch that in the ordinary discharge of his duty, a brakeman would not be required to be on the ladder at the place of the accident, and also that since the railroad company could not anticipate

that the trainmen would be on the ladder at this place, it was free from negligence in so placing the house, but that the brakeman was negligent in being on the ladder at the time he was injured. The court decided that the question of the negligence of the company and that of the trainman should be submitted to the jury.

The narrowing of a space between the wall of a passageway in a mine and cars passing therein, so as to cause the cars to pass dangerously near to the wall is a defect. *McNamara* v. *Logan*, 100 Ala. 187, 14 So. 175.

Where a post used for supporting a chute connected with a stone crusher was so close to the side of a railroad track that it left but 7½ inches between it and passing cars, that fact, together with the requirement of starting cars at that point, necessitating watching the car ahead, controlling the brake, and instantly passing the post, constituted a defect in the ways, works, and plant of the defendant company. *Day* v. *Dominion I. & S. Co.*, 36 N. S. 113. See also *Pierce* v. *Camden, &c. R. Co.* (N. J.), 35 Atl. 266.

It is submitted that upon the evidence in this case the question of the defendant's negligence in failing to provide for decedent a safe place of work, and in exposing him to the dangerous construction of its tracks upon the barge, was for the jury; that the jury could only have determined the question of fact adversely to defendant, and, therefore that the demurrer to the evidence should have been overruled and judgment entered for the plaintiff on the conditional verdict.

Indeed, in some of the cases, negligence of this character has been discussed under the theory that it was so conclusively established as to become a matter of law for the court. *Wilson* v. *Louisville & N. R. Co.*, 85 Ala. 269; *Keist* v. *Chicago, &c. R. Co.*, 110 Iowa 32.

ASSUMPTION OF THE RISK.

No opinion was filed by the Court of Appeals. The order refusing the writ of error is silent as to reasons.

Since assumption of risk is the only defense admitted by any of the courts *in bar* of the action under the Federal statute, where the evidence warrants the imputation of actionable negligence to an interstate carrier, we assume that the court must have held that, *as a matter of law*, the decedent assumed the risk of the danger from which he suffered.

The doctrine of assumed risk as developed and applied in Virginia, is not in harmony with the doctrine as applied by this court. In cases controlled by the common law the exercise by the servant of "ordinary care" to discover the danger is made the test. *Sheeler* v. *C. & O. R. Co.* 88 Va. 188, 201; *Clinchfield Coal Co.* v. *Wheeler*, 111 Va. 265, 275. In *Southern R. Co.* v. *Jacobs*, 116 Va. 189, which arose under the act of Congress, the court applied an even more drastic rule.

In cases controlled by common-law principles, the rule applied by the Virginia court has been thus enunciated:

> " 'If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation or reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, appliance, or fellow-servant in connection with which or with whom he is to labor is unsafe or unfit in any particular; and if, notwithstanding such knowledge, or means of knowledge, he voluntarily enters into or continues in the employment, without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master, in case

it shall result in injury to him.'" *Sheeler* v. *C. & O. R. Co., supra.*

"A servant, when he enters the service of the master, assumes all the ordinary risks of such service, and also as a general rule assumes all risks from causes which are known to him, or should be readily discernable by a person of his age or capacity, in the exercise of ordinary care." *Clinchfield Coal Co.* v. *Wheeler, supra.*

In *Southern R. Co.* v. *Jacobs, supra,* decided by the Court of Appeals on March 12, 1914, the doctrine of assumed risk applied by the court under the act of Congress is to be deduced from instruction A (116 Va. 195) which the court held should have been given at the request of the railway company. The effect of that instruction is to charge an employee, in an action under the Federal act, with assumption of risk, *as a matter of law,* whenever *any* danger exists —whether known or unknown, obvious or latent, remote or imminent—if only he has knowledge, or an opportunity to acquire knowledge of the physical condition from which the danger results.

In the case at bar the writ of error was refused a few months after the decision in *Southern R. Co.* v. *Jacobs, supra.* In the absence of any expression of opinion, we conclude that the court applied to this case the erroneous doctrine which reached its culmination in the defendant's instruction A, approved in *Southern R. Co.* v. *Jacobs.*

The Virginia rule, in its least objectionable form, is in conflict with the doctrine frequently announced by this court, and by the authorities generally:

"Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee. *Texas & P. R. Co.* v. *Archibold,* 170 U. S. 655, 42 L. Ed. 1188, 18 Sup. Ct. Rep. 777." *Choc-*

taw, McDade, 191 U. S. 64, 48 L. Ed. 96-100; *Seaboard Air Line R.* v. *Horton,* 233 U. S. 492.

In the recent case of *Yazoo & Miss. V. P. R. Co.* v. *Wright,* 33 Sup. Ct. Rep. 130, the availability of the defense of assumption of risk was denied by this court for the reason that the facts "preclude all inference that the engineer knew, or, from the facts shown, must be presumed to have known, that the coal cars were protruding over the track on which he was moving, and deliberately elected to assume the risk of collision and great danger which would be the inevitable result of his continuing the forward movement of his train."

> "To bring a case within the scope of the doctrine now under discussion, it must be shown that the servant possessed a sufficiently exact appreciation of the nature and extent of the danger in question to enable him to estimate the possibilities of his environment in so far as they affected his bodily safety. The absence of that appreciation is logically incompatible with the hypothesis that, in undertaking or continuing in the employment, he exercised that intelligent and deliberate consent which is one of the essentials involved in the conception of an assumption of a risk. The first step in the process of establishing this appreciation is to show that the servant was chargeable with a knowledge of the material conditions which were the immediate cause of his injury. Manifestly, he can not be held to have asumed a risk where he was ignorant of the facts on which a proper appreciation of the risk depended. * * * * The second step in the demonstrative process is to establish the servant's appreciation of the danger produced by the abnormal conditions in question. That this is the alternative and crucial element upon which the defense depends is suffici-

ently apparent from the terminology by which it is described." 3 Labatt's Master & Servant (2d Ed.) 1190, pages 3207-3211.

In *Rase* v. *Minneapolis &c. R. Co.* 124 N. W. 360, 21 L. R. A. n. s. 138, criticising the contention that assumption of risk may be imputed to the employee when by "ordinary care" he might discover the danger, the court said:

> "Indeed, the misuse of ordinary care in this direction has usually been the result of inadvertence, and has often been the sequence to mere casual inaccuracy in language. The test has rarely, if ever, been the result of deliberate consideration of principle or precedents. As Mr. Justice White pointed out in *Texas P. R. Co.* v. *Archibold*, 170 U. S. 665, 42 L. Ed. 1188, 18 Sup. Ct. Rep. 777, 779, 'no reason can be found for, and no authority exists supporting, the contention.' It would be a work of supererogation to add to the authorities there cited. They exist, however, in large numbers."

That the decedent did not know or appreciate the danger, is a wellnigh irresistible inference from the manner in which he met his death, and the absence of any satisfactory evidence of a warning given him by any officer, agent or employee of the defendant, coupled with the fact that in all likelihood he received the injury the first time he was confronted with the danger from which he suffered.

In *Miller* v. *Boston &c. R. Co.* (N. H.) 61 Atl. 360, decided in 1905, at a time when contributory negligence was a bar to recovery, the court said, with reference to a brakeman who, while ascending the side ladder, was killed by an over-head bridge:

"From this evidence it could be found that a knowledge of the location and height of the Tilton bridge and an appreciation of the danger arising therefrom were essential to his safety in the performance of his duties; that he did not know of the particular location and height of the bridge and appreciate the dangers thereof; that in the exercise of ordinary care, either in his previous employment or that in which he was then engaged, he would not necessarily learn of them and appreciate the dangers; that the defendants were negligent in not informing him; and that his injury was due to their failure in this respect. Although the burden of proof was upon the plaintiff to show that Miller was in the exercise of due care when he ascended the ladder, and there was no direct evidence disclosing his conduct at that time, nevertheless, the exercise of such care could have been found from the circumstantial evidence that was introduced. *Lyman* v. *Railroad Co.*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; *Hutchens* v. *Macomber*, 68 N. H. 474, 44 Atl. 602. And as there was no evidence that Miller was insane, intoxicated or possessed of suicidal intent, it could be inferred from the ordinary habits and disposition of prudent men, and the instinct of self-preservation taken in connection with the other circumstantial evidence in the case that he was in the exercise of due care, and that his attempt to ascend the ladder at this time and place was due solely to his inadequate understanding of the risk. *Huntress* v. *Railroad Co.*, 66 N. H. 185, 190, 34 Atl. 154, 49 Am. St. Rep. 600. * * * *Murry* v. *Railroad Co.*, 72 N. H. 32, 39, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660. The exclusion of the defendants' evidence that they assumed Miller knew of the location and height of the bridge on the road and the

dangers arising therefrom was not harmful to them. Such an assumption, if proved, would not be a defense to the action. It was the defendants' duty to instruct Miller in regard to this matter, or excuse themselves by proof that he knew of them, or represented that he knew of them, and that they relied thereon. * * * It was competent for the plaintiff's counsel to argue from the fact that Miller was killed the first time he went over the route, taken in connection with the other evidence showing the manner in which the accident occurred, that the jury should infer that he did not know of the danger to which he was subjected."

In *Pierce* v. *Camden, &c. R. Co.* (N. J.), 35 Atl. 286, it was held to be a question for the jury whether the intestate, an extra conductor of a trolley car, killed by striking a post 6½ inches from the step, had assumed the risk, it appearing that, while he had been in the defendant's service about a month, he had been over that part of the road but once.

To the extent that *common-law* assumption of risk may be set up as a defense to an action under the act of Congress, the employee is entitled to have the doctrine properly applied. Being a defense relied upon to defeat a right under a *Federal* statute, this court will, we assume, apply to this case, as it has to all others that have come before it, the principle, as it has been developed by the decisions of this court, by which the servant can not be held, *as a matter of law*, to assume the risk unless the evidence is conclusive that the danger was *known* to him, or was so obvious that his knowledge *must* be presumed, and that the danger was so imminent that a person of ordinary prudence would *not* have encountered it. *Seaboard Air Line R.* v. *Horton* (second decision, January 10, 1916), 36 Sup. Ct. Rep. 180. When the danger is not of that character the

question of assumption of risk is one of *fact for the jury. Choctaw, O & G. R. Co.* v. *McDade,* 191 U. S. 64-68; *Texas P. R. Co.* v *Swearingen,* 196 U. S. 51; *McGovern* v. *Phila. & Reading R. Co.,* 235 U. S. 389; *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668; *Phoenix Mut. Ins. Co.* v. *Doster,* 106 U. S. 32.

In the brief filed for the plaintiff in error in *Jacobs* v. *Southern R. Co.* now pending in this court, as case No. 326 on the docket of the October term, 1915, the contention is made that common-law assumption of risk of the employer's *negligence* can not defeat recovery for liability imposed upon interstate carriers by the first section of the act of Congress. We rely with confidence on that contention and respectfully refer the court to the brief in that case.

No case arising under the act of Congress, so far as we are aware, holds that the common-law doctrine can defeat recovery for injury resulting "in whole or in part" from the negligence of any of the "officers, agents, or employees" of the carrier. Even at common-law the duty to warn and instruct an inexperienced employee is non-delegable; and the officer, agent, or employee to whom the duty is entrusted is thereby made a *vice-principal.* The common-law contractural assumption of the risk of negligence of the fellow-servant, is displaced by the first section of the act. *Mondou* v. *New York, &c. R. Co.,* 223 U. S. 1. To admit any defense in bar when the injury results from the negligence of the officers, agents or employees would be to nullify that portion of the act. *Easter* v. *Virginian R. Co.* (W. Va.), 86 S. E. 37; Seybowski v. Erie R.Co. 95 Atl. 764.

At common law there can be no assumption of risks resulting from failure to adequately warn an employee of the dangers to be encountered. When the danger is such as to require a warning the inexperienced employee, without such warning, can have no *knowledge* of the danger, which is essential to the theory of its assumption. Actual

knowledge of the danger must be shown or its obvious character must be so conclusively established that knowledge must be presumed, before the doctrine of assumption of risk can become a factor in the case.

CONCLUSION.

In conclusion, we submit the following propositions:

1. That the evidence warrants the conclusion of fact that the defendant, through its "officers, agents and employees", was guilty of negligence in failing to warn the decedent of the danger which caused his death.

2. That the convergence of the tracks on the barge was a "defect or insufficiency", due to the negligence of the defendant in its "roadbed, tracks, appliances, boats and equipment."

3. That as a matter of law, common-law assumption of risk is not a defense in bar of the action under the act of Congress, or under the special facts of this case.

4. That in any conceivable view, the question of assumption of risk was one of fact for the jury.

5. That on every disputable fact the evidence would have warranted a verdict for the plaintiff; and, therefore, the demurrer to the evidence should have been overruled and judgment entered for the plaintiff.

> "It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk." *Seaboard Air Line Railway* v. *Koennecke*, 36 Sup. Ct. Rep. 126.

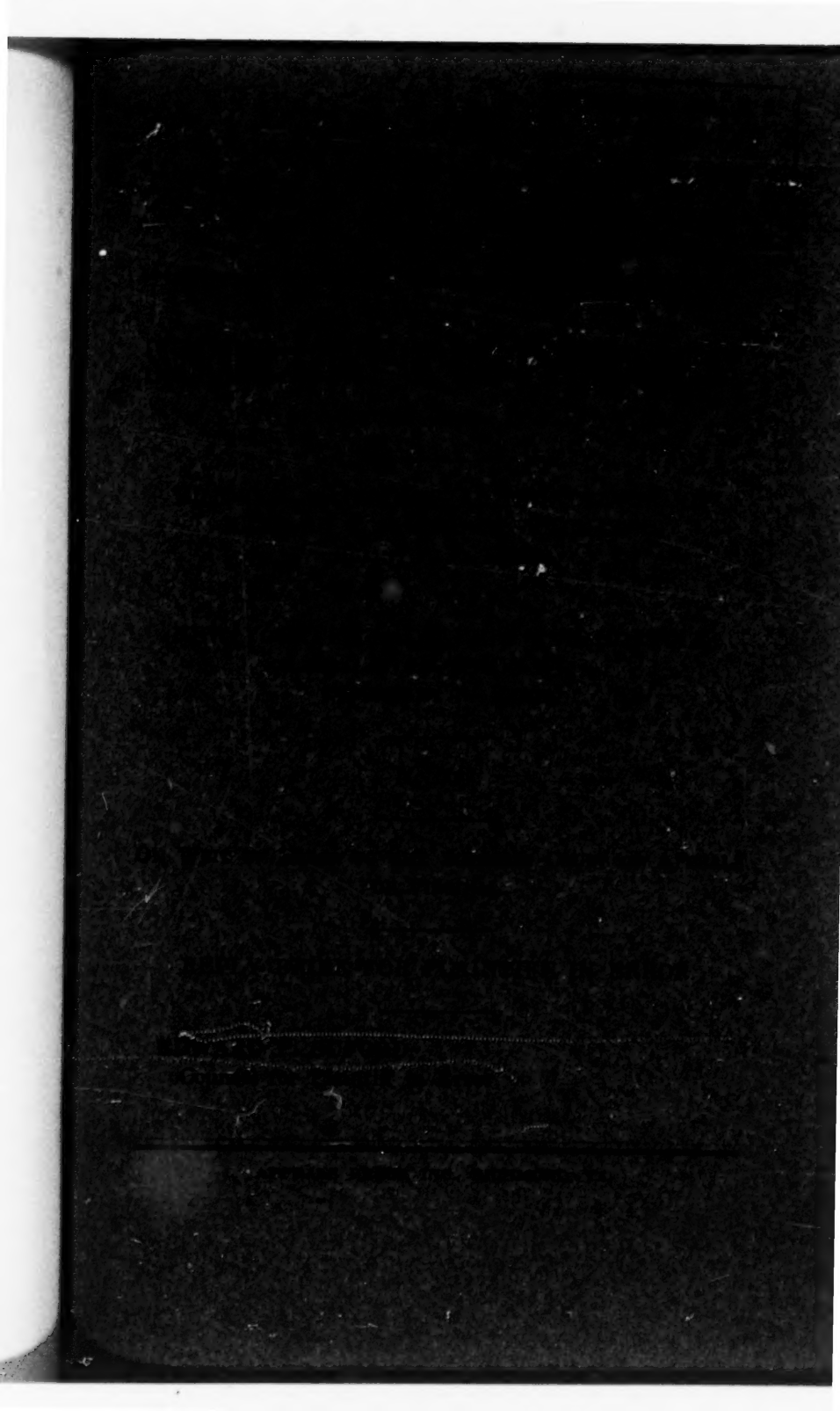
See also the recent decision of the Supreme Court of Vermont in *Ingram's Admx.* v. *Rutland R. Co.* 95 Atl. 544, on demurrer to evidence under the Federal Employers' Liability Act; and of the Supreme Court of New Hampshire on

kindred questions, in *Cantin* v. *Glen Junction &c. Co.*, 96 Atl. 303, which shows that all questions in the case at bar are purely *of fact for the jury.*

Respectfully submitted,

KINDRED BAUGHAM, Administrator of
RICHARD T. BAUGHAM, Deceased,
Plaintiff in Error,
By Counsel.

EDWARD P. BUFORD,
Counsel for Plaintiff in Error.



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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

KINDRED BAUGHAM, ADMINISTRATOR OF RICHARD T. BAUGHAM, DECEASED,
PLAINTIFF IN ERROR,

v.

NEW YORK, PHILADELPHIA AND NORFOLK RAILROAD COMPANY,
DEFENDANT IN ERROR.

No. 327.

ON WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

COMMENTS ON DEFENDANT'S BRIEF.

On page 23 of their brief, the learned counsel for defendant in error state as their conclusion that "experience is the best teacher." Doubtless the court will agree with

counsel in this conclusion after it has read the evasive and inconclusive testimony offered by defendant to show that its "officers, agents or employees", charged with that duty, had imparted to the deceased requisite information as to the dangers of his environment.

On page 24 of their brief, counsel for defendant state that the testimony of the plaintiff as to his conversation with Conductor Boyland, quoted by us in the opening brief, was excluded by the trial court, and add:

> "Counsel at least should have deferred relying on this quotation until the court had had an opportunity to pass upon the ruling of the trial court in excluding the evidence; at least counsel should have called the court's attention to the fact that this evidence was only evidence in the event that this court should sustain their contention that the lower court erred in excluding the evidence."

This is a mistake. What was excluded by the court was the unfinished portion of the sentence, commencing: "He further said that if my brother could have been with him the next day———". This appears from the evidence as filed by the defendant with its demurrer.

It will be seen from the record (pp. 83-4) that Conductor Boyland, a witness for defendant, was cross-examined by plaintiff's counsel as to this conversation. Defendant's counsel objected, but the court overruled the objection (R., 85-6):

> "The Court: Let's get back to the question and the objection. As I understand it, the witness was introduced by the defendant, and was examined, and in his examination in chief stated as to whether or not he instructed the plaintiff's intestate. This cross-examination is for the purpose of testing his recollection as to that. He testified affirmatively,

that he went with him and instructed him, and on cross-examination he was asked whether or not he had certain conversation with certain persons. He recollects the conversation, but not the time or the place, and states in substance what was said. On direct examination he told this person, who turned out to be the brother of the deceased, that he went with him, and that he warned him as if he were his brother. It does appear to me that he has the right to pursue that line of cross-examination.

"Judge Willcox: I want to make the further point, that these gentlemen are injecting into this trial collateral matter as to whether or not this conversation occurred between Mr. Baugham and Mr. Boyland. Now, my friend is introducing it to impeach this man. He is impeaching him on something he brought out himself.

"Note.—The point was argued at length by counsel. The objection was overruled, and an exception noted by counsel for the defendant."

The plaintiff was called as a witness on his own behalf to contradict the testimony of defendant's witness, Boyland. The rulings of the court appear from the following extracts from the record (R., 104-5-6):

"Q. Did you have a conversation with Mr. Harry Boyland, the conductor under whom your brother worked on December 29, 1912, the day before his injury? A. Yes, sir.

"Q. Did he make any statement to you with reference to whether or not he had given your brother any warning of the dangers incident to the business?

"Judge Willcox: I desire to object to that question, because it is seeking to contradict the testimony my friend brought out, as I stated at the time, and because I think the evidence is improper for

any purpose. It can not be possible for any purpose except for the purpose of contradicting Mr. Boyland, and I think it is inadmissible.

"Note.—The objection was overruled, and an exception noted.

"(Question read.)

"A. Yes, sir.

"Q. What statement did he make to you?

"Note.—The same objection, and the same exception is noted.

"A. He told me that he was the first man my brother worked under, and that he instructed him as to the danger so far as he could, under the circumstances. He said that he could not give him full instructions and handle the rest of the business, or attend to his work. That is about the statement he made to me in that regard. He further said that he thought if my brother could have been with him the next day—

"Judge Willcox: I object. That is not evidence.

"The Court: I sustain the objection. He is here to contradict the witness in a certain conversation he is said to have had with him. Mr. Boyland said nothing of this conversation.

"By Mr. Buford: Q. Was it at the same time? A. At the same time, the same conversation.

"By the Court: You must confine your evidence to the warning. With reference to that part of the conversation in regard to the warning. If you go beyond that, that is not rebuttal testimony. That may have been proper testimony on behalf of the defendant, but we are now in rebuttal.

"Judge Willcox: I suppose if Mr. Boyland had expressed an opinion as to the sufficiency of the instruction you would allow that.

"Mr. Buford: We would like to, if your Honor please, if the court feels that we can do so, to recall

Mr. Boyland. We did not ask him about all of the conversation about which Mr. Baugham is now undertaking to testify. We would like to ask Mr. Boyland specifically whether he had any further conversation with Mr. Baugham.

"The Court: That would depend entirely upon the character of the testimony.

"Mr. Peterson: I would like to suggest this: Your Honor suggested just now, if this evidence is not admissible in rebuttal, I would like to ask your Honor, and it is in the discretion of the court, that you would allow us to introduce this evidence in chief.

"Note.—The point was argued at length by counsel.

"The Court: I don't think it is admissible until you have laid a better foundation, and the question is whether you ought not to have done that in your cross-examination of Mr. Boyland.

"Note.—The point was further argued by counsel.

"The Court: The case as presented now to the court is not rebuttal testimony, and is subject to the objection made. The court will, in its discretion, give you an opportunity to further cross-examine Mr. Boyland.

"HARRY L. BOYLAND, recalled for further cross-examination:

"By Mr. Buford: Q. You heard Mr. Baugham *testified* to the conversation, according to his recollection, that he had with you? A. Yes, sir.

"Q. You heard what he said, and you recall what you said on your own examination. Now, what I want to know is: Did you, or not, on the occasion of this conversation go further and say that if the young man had been with you the next day, the day he received the fatal injury, that you could have

given him further instruction that would have saved him from the injury?

"Judge Willcox: I object.

"Note.—The objection was sustained, and an exception noted by counsel for the plaintiff."

Instead of the language quoted by us having been excluded, it appears from this extract from the record that it was objected to by defendant's counsel and his objection was overruled.

The bill of exceptions, drawn by *associate* counsel for plaintiff, mistook the point decided by the court. It refers, however, to the evidence embodied in the demurrer from which the facts accurately appear.

As to what evidence was considered by the court on the demurrer, the stenographic record embodied in the demurrer is *conclusive* and overcomes an error in the bill of exceptions.

If, however, counsel for defendant, notwithstanding these facts, contend that the evidence was excluded, we submit that the exclusion was erroneous and assign it as error, it being apparent that the conversation related to a matter *material*, not *collateral*, to the issue.

On page 32 of their brief, counsel for defendant, after quoting certain language of Judge Keith in delivering the opinion of the Court of Appeals of Virginia in *Southern R. Co.* v. *Jacobs*, 116 Va. 189 (now pending in this court under the style of *Ralph B. Jacobs* v. *Southern R. Co.*, No. 326) make this statement:

> "This would seem to dispose of plaintiff's contention that the fourth section of the act will be construed differently in Virginia than in other States, or that its construction can in any wise be affected by the Virginia Constitution."

Again, on page 49, they say:

> "And we further claim that his position is equally incorrect when he relies for his authority upon the fact that the doctrine of the assumption of risk in Virginia, so far as the employees engaged in railroad service are concerned, was abolished by the State Constitution, rather than by an act of the general assembly."

Counsel have plainly misapprehended our contention on these points in both the case of *Jacobs* v. *Southern Ry. Co.* and this case. The proposition which we have insisted upon in both cases is that the act of Congress being "the sole and supreme law" on the subject, cannot be affected in its operation by the constitutions, the statutes or the common-law of the States. To obviate the necessity for a repetition in this case of the arguments presented for the plaintiff in *Jacobs* v. *Southern Ry. Co.* copies of the opening and reply briefs in that case have been furnished to defendant's counsel. As those briefs are now before the court they will merely be referred to here.

The court, we trust, will pardon our reference in the opening brief to cases stating the rules of decision on demurrers to evidence, which were cited for the convenience, not for the enlightenment, of the court.

Defendant's Duty to Warn Decedent.

In defendant's brief the position is taken (a) that it owed the deceased no duty to warn him as to the danger which resulted in his death, and (b) that, if it owed such duty, the duty was adequately performed.

1. The decedent, at the time of the injury was in his twentieth year. He was inexperienced in railroad service, a fact admitted to have been known to defendant. He was at once assigned to the task of leading brakeman,

after being called for service for the first time, rather unexpectedly, on the morning of Sunday, December 29, 1912. He arrived while the work was in progress, and had an experience on that day of not more than three or four hours in work on the barge (Record p. 87). There is no evidence that during those few hours he had an opportunity to ascertain, *by his own experience*, the danger from which he suffered. That danger consisted in a matter of inches. The *latency* of the danger appears from the testimony of the witness Johnson, the experienced captain of the barge (Record p. 53):

> "Q. Do you know the width between those rails, as to where they enter the barge, when they approach each other most nearly? A. No, sir, I don't know anything about that.
>
> "Q. How long have you been operating that barge? A. That particular one?
>
> "Q. Yes. A. Two years. The first day of last August. I have been in the company seven years. I went to work for the company in 1907, the 26th day of April, on the barge.
>
> "Q. With all of that experience in the service, as the captain of that barge, you cannot tell the jury now the distance between these tracks? A. No, sir.
>
> "Q. Not even approximately? A. No, sir, I don't have anything to do with that.
>
> "Q. Whether between the center tracks, where they commence to converge, to the place they reach greatest proximity, or between the center track and the outside track? A. No, sir, I don't know at all."

Also from the testimony of the witness Harris, a brakeman of "near eight years'" experience (Record pp. 44-5):

> "Q. Now, tell the jury about how the center tracks on the barge are located with reference to

each other? What I want to know is are they the same distance apart where they come from the dock on the barge, as they were down where Mr. Baugham got caught between the cars? A. No, sir, not the same distance.

"Q. How far apart are the two tracks, I mean between the inside rails, where they come upon the barge? A. I don't know, sir. I don't know the distance.

"Q. About how far would you say? A. I don't know. I never measured. * * *

"Q. Could you give any idea as to the number of feet they are apart at the place where the accident occurred? A. No, sir. * * *

"Q. * * * there was plenty of space a part of the way after entering the barge for a man to have climbed up in safety? A. Where the tracks come on the barge?

"Q. Yes. A. Yes, sir.

"Q. For what distance did that space extend along the barge? A. I don't know.

"Q. You would not be able to say how many feet? A. No, sir, I would not be able to say how many feet."

The duty to give specific warning is manifest from the nature of the danger created by the convergence of the railway tracks. The danger so created was a "concealed" or *latent* danger. "The constituent element of it was a matter of mere inches, and that, in the very nature of things, could not be detected by ordinary observation." *Chicago, &c. Ry. Co.* v. *Riley*, 145 Fed. (C. C. A.), 137, 7 A. & E. Anno. Cases, 327; *Wood* v. *Louisville, &c. Ry. Co.*, 88 Fed. 46.

> "No inference may be indulged, as a matter of law, that a boy eighteen or nineteen years of age, and shown by the evidence to be of ordinary intelligence and capacity for one of his years, should be held to the full accountability of an adult." *Bulson* v. *International Shoe Co.*, 177 S. W. 1084; *Dowling* v. *Allen*, 74 Mo. 13, 41 Am. Rep. 298.

In *Bulson* v. *International Shoe Co., supra*, the plaintiff was eighteen years of age. He was injured on the second day of his service. The court found as a matter of fact that the "foreman gave him most meagre and inadequate instructions and only a general warning that if he allowed his hand to be caught between the form and the last, it would be mashed, a fact which, as plaintiff remarked, 'anybody can see.'" The court, in sustaining a judgment for the plaintiff upon the ground of the insufficiency of the warning given, said:

> "The well-known general duty of a master to exercise reasonable care to furnish his servant a reasonably safe place in which to work, and with reasonably safe tools and appliances, embraces the particular duty where an inexperienced servant is employed upon dangerous work, to give the servant such instructions in the proper method of doing the work and such warning of natural dangers and of dangers which will attend a departure from the proper method as is reasonably required by the servant's inexperience and lack of proper knowledge, and which will enable the servant, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself. 26 Cyc. 1176, 1177. This duty the master owes to an experienced adult possessed of the judgment and care presumed in the average adult, but, with respect to a minor, the duty must take into account

the further fact of minority, with its usual concomitants of immature judgment and care, and the master must give such instructions and warnings as are reasonably required to obviate the risks born of such immaturity. 26 Cyc. 1080; 3 Labatts, Master and Servant, 1154, 1155."

In *Hemmingsen* v. *Chicago & N. W. Ry. Co.* (Wis.), 114 N. W. 785, 786, 787, the court, sustaining a judgment for the death of an *experienced* brakeman, said:

"There is no direct evidence that the deceased knew the platform was dangerously near the track, nor that he had ever gone between the platform and a moving car at this point before the time of injury. It is true he was an experienced brakeman, and it does not appear why he passed from the south side of the track in front of the backing cars and went between the cars and the platform. The question of whether he was guilty of contributory negligence as matter of law is not free from doubt and difficulty. In an opinion of the trial court in the record on motion by defendant for a directed verdict the learned trial judge in denying the motion seems to rest his opinion principally upon the fact that deceased never had his attention called to the proximity of the platform to the cars when upon track No. 3, and that the evidence was not sufficient to charge deceased as matter of law with knowledge of the dangerous proximity of the cars to the platform when passing by it. It is said that there was no occasion for deceased to stand between the platform and the moving car. True, it does not appear what his purpose was in so doing. But obviously he had some purpose connected with his duties. If he knew the place was dangerous, doubtless he would not have gone there. The ques-

> tion is, should he have known it? * * * We think that whether he knew or ought to have known of the danger was for the jury. It is at least inferable that he had some reason for going to the platform, which he regarded sufficient in the discharge of his duties. He was on the ground, and in the best position to judge of the necessity for going where he did at the time of the injury. It is practically conceded by appellant that he did not regard the place unsafe when he went there. Nor do we think the evidence is clear that he ought to have discovered the danger before he was struck. There is evidence that he went across to the platform in great haste, 'rushed across' immediately in front of the cars as they were being pushed onto the track. Now it may well be that he was caught before he had time to know the danger, or extricate himself from it, if he did discover it, while in the perilous position."

In *Mather* v. *Rillston*, 156 U. S. 391, 39 L. Ed. 465, it is said:

> "If persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers also will be chargeable for the injuries sustained."

In *Wheeler* v. *Wason Mfg. Co.*, 135 Mass. 294, 296, it is said:

> "This case * * * is not like one where a practiced and skilful workman is set to work upon machinery which, though dangerous in itself, and requiring the use of great care, he nevertheless thoroughly understands, and is willing to take the

> risk of using, in the condition in which he finds it. We cannot say that the jury would not be warranted in finding that the saw was in an unsafe and improper condition for the plaintiff, a beginner in the use of such machinery, to be put to work upon."

In view of the facts disclosed by the record as to the character of the danger and the lack of experience of the deceased, it is submitted that the necessity for warning is apparent, *as a matter of law*. The least that can be said is that it was a question of fact for the jury.

2. That defendant's officers, agents and employees were negligent in failing to give adequate warning is practically admitted by its counsel, when they declare as their final conclusion that "experience is the best teacher." The deceased was not qualified by experience. He was, therefore, entitled to adequate instruction, and the question of its adequacy, under the evidence adduced, was plainly for the jury.

In *Reinhart* v. *Griffin Mfg. Co.* (Pa.), 95 Atl. 102, in holding that the extent of the instruction which should have been given to an inexperienced girl seventeen years of age was for the jury, the court said:

> "When young persons without experience are employed to work with dangerous machines, it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazard of carelessness in their use; if the employer neglects this duty, or if he give improper instructions, he is responsible for the injury resulting from his neglect of duty.'"

(Carlson v. Stair-Board, 68 95 A. 962

The logic of the court in declaring the duty of the employer towards persons without experience, to be the duty to warn the employee of the hazards of carelessness in the discharge of his duty, is apparent. The duties ordinarily

required of the employee, unless involving some peculiar manual or technical dexterity, if properly performed are safe, and may be discharged without danger to the operator. The danger with which an inexperienced employee is ordinarily menaced resides not in the performance of the work itself, but in some collateral or adventitious circumstance. Merely to know that an operation is to be performed in a certain way affords him no security against the danger which may attend the performance of it in another way, which may be obviously one in which the work can as well be performed as in the way indicated. Effectually to protect him against the consequences of inexperience and indiscretion, where these qualities exist, the duty of the master, having full cognizance of the situation, is to point out the sources of these adventitious or lurking dangers and to caution him against the dangers involved in another mode of discharging his duty than the one prescribed. In other words, the injunction of the master to perform the work in a definite manner should be accompanied by a warning against danger involved in the performance of the work in another manner which, though an obvious method of performing the duty, may yet be attended with dangers unappreciated by the employee.

In the opening brief for the plaintiff we quoted the testimony to show the inadequacy of the instruction claimed to have been given by Conductor Boyland during the three or four hours of the first day of decedent's experience in railroad service. The supplementary quotations made by defendant's counsel emphasize the inadequacy of the performance by Boyland of this important duty. Conductor White, under whom deceased was working the next day, on the morning of which he suffered the injury, does not claim to have given him any *warning as to dangers.*

We have carefully read the authorities cited by defendant's counsel with respect to both the necessity for, and the adequacy of, the instructions given. The cases in which

employers were exonerated from liability turned upon the fact that the employees were experienced, or were chargeable with contributory negligence, which was given its common-law effect as a complete bar to the action. Thus in *Kohn* v. *McNulta*, 147 U. S. 238, 37 L. Ed. 150 (and their other cases are similar), Mr. Justice Brewer said:

> "With respect to the merits of the case, the decision of the court was also clearly correct. The intervenor was twenty-six years of age; he had been working as a blacksmith for about six years before entering into the employ of the defendant; he had been engaged in this work of coupling cars in the company's yard for over two months before the accident, and was therefore familiar with the tracks and condition of the yard, and not inexperienced in the business."

Why the learned counsel for defendant should have cited *Kane* v. *Northern C. Ry. Co.*, 128 U. S. 91, in support of their contention is not apparent. In that case Mr. Justice Harlan said:

> "But it is said that the efficient, proximate cause of the injury to the plaintiff was his use of the defective appliances at the end of the car from which he fell, when he knew and at the moment of letting himself down from that car should not have forgotten, as he said he did, that one of its steps was missing. It is undoubtedly the law that an employee is guilty of contributory negligence which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if

in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such needless exposure of himself to danger. *Hough* v. *Texas & P. Ry. Co.*, 100 U. S. 224; *D. C.* v. *McElligott*, 117 U. S. 621, 631; *Goodlet* v. *Louisville & N. R. Co.*, 122 U. S. 391; *Northern Pac. Ry. Co.* v. *Herbert*, 116 U. S. 642. But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. In the case before us, the jury may, not unreasonably have inferred from the evidence that while the plaintiff was passing along the tops of the cars, for the purpose of reaching his post, he was so blinded or confused by the darkness, snow and rain, or so affected by the severe cold, that he failed to observe, in time to protect himself, that the car from which he attempted to let himself down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps. While a proper regard for his own personal safety, and his duty to his employer, required that he should bear in mind, while passing over the cars to his station, that one of them was defective in its appointments, it was also his duty to reach his post at the earliest practicable moment; for not only might the safety of the moving train have depended upon the brakemen being at their posts, but the engineer was entitled to know, as the train moved off, by signals from the brakemen, if necessary, that none of the cars constituting the train had become detached. If it be suggested that the plaintiff ought not to have left his post and gone to the caboose when the train stopped at Coldfelters,

the answer furnished by the proofs is that he was justified in so doing, by usage and by the extraordinary severity of the weather. And if his going back from the caboose was characterized by such haste as interfered with a critical examination of the cars as he passed over them, that may, in some measure at least, have been due to the fact that the first notice he had of the necessity of immediately returning to his post was that the train was moving off.

"Without further discussion of the evidence, and without intimating any opinion as to what ought to be the verdict upon the issue of contributory negligence, we are of opinion that the court erred in not submitting to the jury to determine whether the plaintiff, in forgetting, or not recalling, at the precise moment, the fact that the car from which he attempted to let himself down was the one from which a step was missing, was in the exercise of the degree of care and caution which was incumbent upon a man of ordinary prudence in the same calling, and under the circumstances in which he was placed. If he was, then he was not guilty of contributory negligence that would defeat his right of recovery."

If the weather conditions referred to in that case and the sense of duty to be performed made the question respecting the conduct of the experienced employee who had actual knowledge of the defective appliance, one of fact for the jury, the inexperience of the deceased in the case at bar, his mental preoccupation in the duty to be performed in applying brakes on the incoming car, the movement of which was accelerated by the lowness of the tide, and the absence of evidence that he at any time had knowledge of

the danger, likewise make this case peculiarly one for the jury.

DEFECTIVE CONSTRUCTION OF BARGE.

It is submitted that the dangerous construction of the barge was a "defect or insufficiency," within the purview of the first section of the act of Congress, for which the defendant is liable. As shown in the opening brief no engineering question is involved, and no necessity for this type of construction.

In *Dorsey* v. *The Phillips, &c. Co.*, 42 Wis. 583, where the conductor of a freight train while ascending by a side ladder to the top of a car in motion, was struck by a cattle chute, the court, in sustaining a judgment for the plaintiff, said:

> "The operation of railroad trains is essentially highly dangerous, and it is a duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate, the necessary danger. This is not merely a private duty to individuals concerned, but a public duty to the State, concerned in the welfare of its citizens. And no custom, however uniform or universal, which unnecessarily exposes railroad employees to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condidition of their charters. We use the word unnecessary, advisedly; distinguishing necessity from convenience. A convenience may be so great as to be regarded as a practical necessity. But a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle chutes to the track as to jeopardize life and limb of persons operating trains. * * * A greater distance from the track might

have made it more troublesome to load cattle from it, but would have insured operatives of the road from danger of life and limb. Human life is too precious in the eye of the law to be so slightly hazarded. Railroad companies owe a higher measure of duty to those who operate their trains, and to the public. * * * The court could not say, as matter of law, that he knew of the extraordinary danger, and continued his employment at his own risk of it. There was enough in the evidence to make his knowledge and acquiescence a proper question for the jury."

In *Boston, &c. Ry. Co.* v. *Gokey* (C. C. A.), 149 Fed. 42, 9 A. & E. Anno. Cases, 384, where a brakeman, while ascending the side ladder of a car was injured by a switch target dangerously near the track, the court said:

"It cannot be successfully maintained that the danger from such a structure was one of the ordinary risks assumed by the plaintiff on entering the defendant's employ. The law imposed upon the defendant the duty of furnishing for the use of its servants fit and suitable means and appliances. The jury found that the defendant failed to perform this duty; they found, in effect, that the defendant furnished an unsafe switch with the target so located that it served as a trap in which employees, ignorant of its position, might be caught and killed or injured. Whether such a structure was one reasonably safe and proper to be maintained at the place described was a question of fact and was presented to the jury under instructions as favorable as the proofs warranted.

"The same statement is true as to the alleged contributory negligence of the plaintiff. It cannot be

said, as matter of law, that he was at fault in not ascertaining the situation in time to avoid contact with the target. The peril was not so obvious as to justify the trial court is imputing negligence to the plaintiff in failing to discover it. In the absence of notice or knowledge to the contrary he had a right to assume that when in the discharge of his duty he was required to mount a moving car, he would not be hurled to the ground by a target placed so near the car that his body could not pass in safety. At least it was a question for the jury.

"The case is an exceedingly simple one upon the facts, involving questions which are constantly arising in negligence cases; these questions were properly sent to the jury under instructions which fairly presented the conflicting contentions of the parties, and, after a careful examination of the record, we fail to find any error which warrants us in reversing the judgment. We are unanimously of the opinion that the trial was fairly and impartially conducted, and that the verdict, considering the irreparable injury to the plaintiff, was a moderate one."

To the same effect see *Pidcock* v. *Union P. Ry. Co.* (Utah), 1 L. R. A. 131. We refer, without repetition, to other cases cited in the opening brief to show that the weight and reason of the authorities make the question of negligence involved in this unnecessarily dangerous construction of the tracks upon the barge, one of fact for the jury.

ASSUMPTION OF RISK.

In the opening brief for the plaintiff (pp. 37-44) the doctrine of assumption of risk is discussed with reference to the application of that doctrine at common law with

respect to the convergence of the tracks on the barge, and with respect to the negligence of the "officers, agents or employees" of the defendant in failing to warn the deceased.

With respect to the convergence of the tracks, considered as a "defect or insufficiency," it is submitted that the deceased could not, even on common-law principles, have assumed the risk, for lack of knowledge of the danger involved. In addition to the cases cited in support of that contention we desire also to cite *Scanlon* v. *Boston, &c. Ry. Co.*, 147 Mass. 484, 9 Am. Rep. 733.

In that case the plaintiff was employed as a brakeman by the defendant corporation, and, in the performance of his duty, was climbing a ladder on the outside of a freight-car. While in this position, he was struck by a signal-post and knocked from the car. The post was about ten inches square, fifteen feet high, and within one foot of the ladder from which plaintiff was knocked. He had no previous knowledge of the height of this post, or its proximity to the track, and no directions were given him by any person in regard to the car or the obstructions on the road. He was merely told to keep near the breakman at the head of the car, and he would find what to do. The defendant requested the judge to rule that the plaintiff could not recover, because the danger from which he had suffered was incident to the employment he had taken upon himself. The judge ruled accordingly, and directed a verdict for the defendant.

In reversing the judgment and awarding the plaintiff a new trial, the court said:

> "In the case at bar, we think the danger was not so obviously incident to the employment that the plaintiff can be held to have assumed the risk of injury from it, and that it cannot be said, as matter of law, that he was bound to know and appreciate the danger."

At common law there can be no assumption of risks resulting from failure to adequately warn an employee of the dangers to be encountered. When the danger is such as to require a warning the inexperienced employee, without such warning, can have no *knowledge* of the danger, which is essential to the theory of its assumption.

All courts agree that assumption of risk is not available as a defense under the act of Congress, when the injury results in whole or *in part* from the negligence of the officers, agents, or employees" of the carrier, as distinguished from a "defect or insufficiency" due to *its* negligence in its its physical appliances. *Mondou* v. *New York, &c. Ry. Co.*, 223 U. S. 1; *Easter* v. *Virginian Ry. Co.* (W. Va.), 86 S. E. 37; *Portland, &c. Co.* v. *Jarvis* (C. C. A.), 227 Fed. 8; *Grybowski* v. *Erie Ry. Co.* (N. J.), 95 Atl. 764. In the case last cited it is said:

> "The third ground upon which the defendant rested its motion was that the plaintiff was barred from a recovery because her husband had assumed the risk of the accident which produced his death. This ground, also, we think, is without substance. The doctrine of assumption of risk has no application to such risks as arise solely and directly out of the negligent acts of fellow-servants. And if it did so apply, as a general rule, it would have no pertinence in the case of accidents the right of recovery for injuries arising out of which is regulated by the federal statute; for to so hold would be to nullify the declaration of Congress that every common carrier by railroad engaged in interstate commerce shall be liable in damages to the personal representative of any employee who shall lose his life while employed in such commerce, when his death results 'from the negligence of any of the officers, agents or employees of such carrier.'"

In the opening brief we expressed the opinion that the Court of Appeals of Virginia refused the plaintiff a writ of error upon the theory of assumption of risk as applied by that court in the case of *Southern Ry. Co.* v. *Jacobs,* 116 Va. 189. The effort of the defendant to justify this ruling by the extensive quotation in their brief from the opinion in that case shows that they entertain the same view.

The decision of the Court of Appeals in that case is now under review in this court. For the reasons presented in the briefs for the plaintiff in error in *Jacobs* v. *Southern Ry. Co.,* it is respectfully submitted that the common-law defense cannot defeat liability for negligence in either aspect under the first section of the act of Congress.

One of the grounds upon which it is contended that neither assumption of risk nor any other common-law defense is available to defeat recovery under the acts of Congress, is that the language of the first section, "* * * * shall be liable in damages * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment," imposes *absolute liability;* that the imposition of unconditional liability for *negligence,* in the terms in which that liability is imposed, *excludes* all common-law defenses in bar of recovery.

In support of this contention, we refer the court to the following authorities, which have come to our attention since the briefs in *Jacobs* v. *Southern Ry.* Co., were written: *Laird* v. *Railroad,* 62 N. H. 254, 13 Am. St. Rep. 564; *Peter v. Chicago, &c. Ry. Co.,* 121 Mich. 324, 80 Am. St. Rep. 500; *Rowell* v. *Railroad,* 57 N. H. 132, 24 Am. Rep. 59; 33 Cyc. 1341, note 36 and authorities. These cases hold that the liability imposed by statutes for damages caused

by fires set out by railroads is *absolute* and excludes all defenses except those permitted by the terms of the statutes.

Respectfully submitted,

KINDRED BAUGHAM,
Administrator of Richard T. Baugham, Deceased,
Plaintiff in Error, by Counsel.

EDWARD P. BUFORD,
Counsel for Plaintiff in Error.

April 3, 1916.

Supreme Court of the United States.

OCTOBER TERM, 1913.

KINDRED BAUGHAM, ADMINISTRATOR OF RICHARD F. BAUGHAM, DECEASED,

v.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

No. 197.

ON WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

THOMAS J. GOWEN,
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Supreme Court of the United States,

OCTOBER TERM, 1915.

KINDRED BAUGHAM, ADMINISTRATOR OF RICHARD T. BAUGHAM, DECEASED,

v.

NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY.

No. 327.

ON WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

In the Circuit Court of Norfolk County a demurrer to the evidence was sustained, and upon an appeal to the Supreme Court of Appeals of Virginia a writ of error was denied. The petitioner in his application for a writ to this

Court assigns as error the refusal of the Supreme Court of Appeals of Virginia to grant him a writ of error to the judgment of the Circuit Court of Norfolk County. The action of the Virginia Court could not have been otherwise, as the record fails to show any negligence on the part of the defendant, and further shows that the plaintiff's intestate assumed as one of the risks of his employment the risk of such an accident as the one in which he lost his life and that he was guilty of contributing negligence. The danger was open and obvious, and it was not a "case where the violation by such a common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee."

STATEMENT OF FACTS.

Baugham, the deceased, was employed by the defendant as a brakeman, and at the time of his death was working upon its cars while the same were being shoved from its dock at Port Norfolk, in Norfolk County, on to its barge, to be transferred thence to Cape Charles, Virginia. The barge was one of the barges then in use by said company. Upon its deck there were four tracks, two on each side of the middle line of the barge. Above the tracks, midway the barge, the pilot house was located. This house was supported by iron uprights or stanchions as described by witness Richardson and shown in photographs in evidence, (Rec. p. 94). This was absolutely necessary for the navigation of the barge and had to be high enough above the cars to allow him to have an unobstructed view. Fourteen cars had been placed, six on the east centre and eight on the East side, or right-hand track; fourteen cars were being shoved on the West side, or left-hand tracks. It was the duty of the deceased to ride on the fourteen cars as they were being shoved in on West outside track, and after six of these cars had been cut off on the barge, his duty was to place the brake on the forward or north car to stop the cars. After this it was his duty to walk back on top of the cars to the South end and as the eight cars were shoved on the barge on the West centre track he was expected to

step across a narrow space from the standing to the slowly moving cars, and again set the brake on the forward car. He had been fully instructed and shown how to do this work the day before and on the day in question. As a matter of fact, however, after he once saw the work done further instructions were not needed, either to enable him to do the work or to avoid the dangers incident to the service, these dangers being such that any person of average intelligence, over the age of twenty-one years. had only to look in order to observe them. Instead of stepping from the stationary car to the slowly moving car, which he should have done, and which the evidence shows he could easily have done, he elected to descend to the deck of the barge, walk across the track upon which the coming cars were moving, and then climb up on the right-hand, or East side of the moving car, well knowing that as it moved forward the space between it and the cars standing on the opposite track became narrow to the point of absolute danger, and while so doing he was caught between the moving car and the car standing East of it, and received the injury which caused his death.

It will thus be seen that the defendant company was guilty of no negligence, that the plaintiff's intestate assumed the risk of the accident in which he lost his life when he entered the employment of the company, and was also guilty of clear contributory negligence.

RULES OF CONSTRUCTION OF DEMURRER TO EVIDENCE.

Counsel for plaintiff in error discuss this rule at length. We shall refrain from attempting to give the Court any aid on this question, believing it needs none. If we may be pardoned for seeming levity we might add that under similar circumstances the President of the Court of Appeals of this State went on record as declaring that if at this time that Court did not understand the rule as to a demurrer to the evidence it was hopeless.

REAL QUESTIONS INVOLVED.

These can best be discussed under the following heads:

1. WHETHER THE EVIDENCE SUSTAINS THE CHARGE OF NEGLIGENCE ON THE PART OF THE DEFENDANT'S OFFICERS, AGENTS OR EMPLOYEES IN FAILING TO INSTRUCT AND WARN THE DECEDENT AS TO THE DANGER WHICH CAUSED HIS INJURY AND DEATH.

2. WHETHER THE EVIDENCE SUSTAINS THE CHARGE THAT THE CONVERGENCE OF THE CENTRAL TRACKS ON THE BARGE WAS A DEFECT OR INSUFFICIENCY DUE TO THE NEGLIGENCE OF THE DEFENDANT IN ITS TRACKS, ROADBED, BARGES OR EQUIPMENT.

3. WHETHER THE DECEDENT ASSUMED THE RISK OF THE DANGER WHICH RESULTED IN HIS INJURY AND DEATH.

We will proceed to discuss these in the order named.

1.

DOES THE EVIDENCE SUSTAIN THE CHARGE OF NEGLIGENCE ON THE PART OF THE DEFENDANT'S OFFICERS, AGENTS OR EMPLOYEES IN FAILING TO INSTRUCT AND WARN THE DECEDENT AS TO THE DANGER WHICH CAUSED HIS INJURY AND DEATH ?

This question can be best discussed under the following two sub-divisions:

a. DOES THE EVIDENCE SHOW THAT THE DEFENDANT OWED THE PLAINTIFF'S INTESTATE THE DUTY OF INSTRUCTING HIM AGAINST A DANGER WHICH WAS OPEN AND OBVIOUS TO ONE OF ORDINARY INTELLIGENCE ?

b. IF THE DEFENDANT OWED THE PLAINTIFF'S INTESTATE THE DUTY TO INSTRUCT AND WARN, DOES THE EVIDENCE SHOW THAT IT FAILED IN THIS DUTY ?

a.

The uncontradicted evidence of the witnesses for the plaintiff and defendant alike describe the deceased as a bright young man of above the average intelligence.

Mrs. Roberta A. Baugham, the decedent's mother, introduced by the plaintiff, testified as follows: (P. R., p. 40).

Q. He was a bright, intelligent boy?
A. Yes, sir.

Harry L. Boylan, Conductor, introduced by defendant, testified as follows: (P. R., p. 80).

Q. Had you known him any length of time?
A. I had been knowing him three or four years.
Q. Was he a man of average intelligence so far as you observed?
A. So far as I know he was above the average apparently.

J. C. Hubbard, introduced by the defendant, testified as follows: (P. R., p. 91).

Q. How was he with reference to intelligence?
A. Above the average, that is the reason I wanted to get him.

We contend that it has been established that the deceased was a man of above the average intelligence.

Now let us examine the evidence as to the open and obvious character of the danger which caused the death of the deceased.

In our opinion this question can be best answered by requesting the Court to look at the several photographs referred to by Mr. Waller and identified by him (P. R., p. 51); these photographs show the barge at various stages of loading. It can easily be seen that there is not sufficient room for a man to crawl up the side ladder

between the cars on the middle right-hand and middle left-hand tracks. A single glance at the photographs will convince the Court that we are absolutely correct in this position. Aside from the photographs, the testimony of several witnesses is equally convincing.

Capt. F. E. White, Conductor, under whom the deceased was working, testified as follows: (P. R., p. 64).

> Q. Was the distance between these cars after they passed the flag pole so close as to suggest danger to anyone who attempted to get up?
>
> A. Yes, sir.
>
> Q. Any man of ordinary prudence would have seen the danger of attempting to get up on these cars when they moved?
>
> A. Yes, sir.

This question was objected to, but the Court allowed the witness to answer it to enable the Court to pass on the question of negligence *per se*.

Having, as we believe, established two propositions, namely, that the deceased was a man *above the average intelligence*, and that the danger was *open and obvious*, let up apply the law on this subject as laid down in numerous cases, to ascertain if there was any duty on the defendant or its agents or officers to instruct or warn the deceased against the danger which caused his death.

Before quoting from any cases we wish to call attention to the fact that this intelligent man, the deceased, had, previously, worked as a carpenter for two years (P. R., p. 37); as such it can be inferred that the deceased must have become familiar with gauging short distances by the eye. This experience enabled him to gauge the distance between the two cars, and this should have convinced him of the impossibility of crawling up on the side of cars situated on the right-hand and left-hand center tracks.

In this connection we must bear in mind that the deceased had loaded and unloaded barge No. 14 on the preceding day, and had also loaded and unloaded barges Nos. 2, 4 and 16, which are identical with barge No. 14 in con-

struction and location of tracks. Having ridden in as often as he had upon the North end of the cars a casual glance downwards would have shown him that there was only a space of a few inches between the cars and should have convinced any reasonably intelligent man of the danger. A single trip would as fully advise the deceased of the proximity of the cars and the danger incident thereto as would ten times that number.

We will now cite the authorities upon which we rely to sustain our contention that there is no obligation upon the master to warn against open and obvious dangers.

Kohn v. McNulta, 147 U. S. 238.
American Locomotive Co. v. Whitlock, 109 Va. 238.
Fields v. Virginian Railway Co., 114 Va. 558.
Keats v. Nat. Heeling Co., 65 Fed. 940.
Chic. B. & G. Co. v. Shalstrom, 195 Fed. 725.
Haring v. Great Northern R. R., 119 N. W. 325.
Richards v. Mich. Pressed Steel Co., 119 N. W. 1077.
Kempton v. Boston Elev. Co., 104 N. E. 358.
Hollingshead v. Detroit R. R. Co., 148 N. W. 171.
Hardy v. Chi. R. I. & P. Co., 115 N. W. 8.
White v. Owosso Sugar Co., 112 N. W. 1125.

In Fields v. Virginian Railway Company, 114 Va., 558, the duty of the master to the servant is clearly and concisely stated by Judge Buchanan, who, delivered the opinion of the Court as follows:

> "It is the duty of the master to use ordinary care and diligence to provide a reasonably safe place in which his servant is to work, considering the character of the work to be done, and for a failure to do so he is liable for resulting injuries to the servant. The servant, however, assumes all the ordinary risks of the service in which he is engaged. He also, as a general rule, assumes all risks from causes which are known to him or which should be readily discovered by a person of his age and capacity in the exercise of ordinary care. The law does not make it the duty of a master to warn a ser-

vant of an open and obvious danger of which he knows, or could have known by the exercise of ordinary care. Such dangers are risks incident to the employment. Robinson v. Dininny, 96 Va., 41, 42, 30 S. E., 442, and authorities cited; Jacoby Co. v. Williams, 110 Va., 55, 61-2, 65 S. E., 491; American Locomotive Co. v. Whitlock, 109 Va., 238, 63 S. E., 791; Southern Ry. Co. v. Foster's Admr., 111 Va., 763, 767-8, 69 S. E., 972, and authorities cited; Cabin Branch, etc., Co., v. Hutchinson's Admr., 112 Va., 37, 70 S. E., 480."

In American Locomotive Co. v. Whitlock, 109 Va., p. 238:

> "If the danger was open and obvious, then it was one of the risks incident to the employment, and the law did not make it the duty of the defendants to warn the plaintiff of such danger.

In Chi. B. & Q. R. R. v. Shalstrom, 195 Fed., p. 725:

> "No duty rests on the master to warn a servant of defects, risks, or dangers that are so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence and experience."

In Keats v. National Heeling Mach. Company, 65 Fed., 940, the Circuit Court of Appeals for the First Circuit, rendered a short and concise opinion on this subject, which we quote in full:

> "We do not find in this case any evidence of negligence on the part of the defendant in the construction and arrangement of its premises and machinery. The employment of a set screw upon a revolving shaft, which caused the injury to the plaintiff, was the common and ordinary way in which such shafts were constructed. The defendant was

a mechanic of mature years, and had worked on these premises for some time before the accident occurred. It is also shown that he might have performed the work without danger by another method of reaching it, requiring, perhaps, a little more time. Upon this state of facts, we think the defendant had no reasonable cause to believe that the plaintiff would do the work in such a way as to expose himself to danger, and that it was not guilty of negligence in not warning him. The rule laid down in cases where employees are set at work in positions of unusual and concealed danger is not applicable to the present case. In our opinion, there was no evidence of negligence sufficient to support a verdict by the jury for the plaintiff, and the court below committed no error in directing a verdict for the defendant."

In Haring v. Great Northern R. R. 119 N. W. F. 325:

"It is shown that the danger complained of was an open and obvious one to persons possessed of ordinary intelligence; that the business was conducted in the manner usual in railroad operation; that the deceased was not ordered or called on to take the position he assumed; that a safe and appropriate place on the side of the car opposite the platform was provided to perform his duties, and that he voluntarily chose this place of danger to perform his duties. Under these circumstances the danger cannot be held to be an abnormal or extraordinary one, but it is one common to the conduct of the business and obvious to a man of ordinary intelligence, knowledge and experience while in the exercise of ordinary care. Under these circumstances there was no duty to warn the deceased of the peril complained of and he was guilty of negligence in assuming this place of danger to perform his duty."

Richards v. Michigan Pressed Steer Co. 119 N. W. 1077 is quoted to sustain our position because the facts show that the employee was hurt on the first day of his employment to work with the dangerous machinery, yet the same rule was applied as to master's duty.

If our position is sustained, as we believe it is, by authorities cited, it is a complete answer to the propositions announced in subdivisions 1, 2, 3, 4, 5 and 6 under head of Inference of Facts (see p. 10 to 18 P.'s brief) and these need no further consideration at our hands.

b.

IF THE DEFENDANT OWED THE PLAINTIFF'S INTESTATE THE DUTY TO INSTRUCT AND WARN, DOES THE EVIDENCE SHOW THAT IT FAILED IN THIS DUTY?

Granting we are wrong in the contention that it was not the duty of the defendant to warn against open and obvious dangers, let us look at the evidence and see if it does not show that the deceased was properly instructed as to his duties and the manner of performing his work; and further, expressly told not to get down on the deck of the barge, as it was not necessary, thereby notifying a reasonably intelligent man that the warning must have been given because of the danger incident thereto.

The question which we are now discussing under this head really involves the sufficiency of the instruction or warning. The sufficiency of the instruction or warning largely depends on the instrumentality to be dealt with or danger to be avoided. If the instrumentality is dangerous in itself or the danger great, the instructions should be of one kind; if, on the other hand, the instrumentality is not in itself dangerous, or the danger is open and obvious, the instruction or warning would be of another kind, so it seems to us that we have reached a point in our argument which brings us back to the question of whether or not the danger was open and obvious.

Granting that the law imposes the duty on the defendant to fully instruct the employee, surely the law cannot be construed to mean that it imposes the duty on the defendant to do more than instruct the plaintiff's intestate how to properly perform his duties. It does not impose the duty to warn the plaintiff's intestate not to put himself in a position of obvious danger, the employee having been performing his work in a correct manner and having given no indication that he was going to do it in any other manner. The case at bar is similar to the class of cases, of which numerous examples can be found in the books, where a servant is operating a dangerous machine, and having been duly instructed as to the proper manner of operating the machine, deliberately places himself in a position of open and obvious danger. One of this class of cases is a case where the servant was operating a trip-hammer. It was held in this case that it was sufficient to instruct the servant as to the proper manner of performing his duty and that the duty was not imposed upon the employer to warn the servant not to place his hand under the hammer, which was liable to fall at any time. We refer to Richards v. Mich. Pressed Steel Co., *supra*. In our judgment such is the case at bar. If for the sake of argument it was the defendant's duty to instruct the plaintiff's intestate how to perform the work assigned him, it cannot be held that it was the defendant's duty to anticipate that the deceased would leave a safe place and attempt to climb between the cars on the middle tracks, as the danger was so obvious. See Poirier v. Bartlett Lumber Co. 148 N. W. 750. We content that the record shows that the defendant performed its duty when it instructed the plaintiff's intestate as to how to perform the duties assigned him, believing that the plaintiff's intestate, being a reasonable man, would not place himself in a position of open and obvious danger.

We will now quote from the testimony of the witness to show clearly what instruction and warnings were given the deceased.

Capt. White, Conductor, introduced by the plaintiff, testified on re-direct examination as follows: (P. R., p. 64)

Q. Do you definitely recall now having warned or having told Baugham to walk from one car to the other, without going to the ground?

A. Yes, sir; I told him when he was on top to step from one car to the other *and not to get down* (Italics ours), that there was no necessity for him to do it, but to stay on top to pass signals.

Harris, a witness called by the plaintiff, under cross-examination, testified (P. R., p. 47):

Q. Did you ever see any other brakeman climb up that way?

A. No sir.

Q. Did they have any duties to perform on the barge to make them climb up between the cars?

A. No, sir.

Again, on page 49, on re-direct examination:

Q. Was not the end car the one he ought to have gotten on?

A. Yes, sir.

Q. It was the one he had to be on to apply the brakes?

A. Yes, sir.

Q. What other way was there for him to get on the car except to climb upon it?

A. At that time?

Q. Yes.

A. Stand on the side-track and step over when the moving car came along.

Q. How?

A. Standing on the stationary car and step on the moving car as it passed.

Again on the same page, replying to counsel for plaintiff:

Q. What I want to ask you, according to what you have just said, it would be your idea of what he ought to have done, was to remain on the standing car on the extreme left track until the rest were shoved in, and while in motion step across the space between the center track and the outside track?

A. Yes, sir.

Q. How far would he have to step?

A. I don't know, sir, exactly. It is not very far. It is a short distance. A man can step across there easy.

Again, on re-cross examination (page 50):

Q. When you started to cut the cars off on the other side did Mr. Baugham get down from the standing car and climb up on the moving car, or step from the standing car to the moving car?

A. He stepped from the standing car to the moving car.

Q. Is that the way you always do?

A. Yes, sir.

Again, in answer to counsel for paintiff:

Q. How do you know that?

A. Well that is the way we generally do.

Q. How do you know he did it?

A. I did not say he did that, I did not say he always did.

Q. How do you know Mr. Baugham did ever step across the cars at all?

A. I was looking at him when he stepped across.

Q. When?

A. The 29th and 30th when we shoved on the East track of barge 14.

Q. What occasion had you to look when he was doing it?

A. My business to look at him.

Q. Was it your business to tell him how to do it?

A. No, sir.

Q. You did not tell him how to do?

A. Not particular.

Q. You did not tell him anything as to how to perform the duties?

A. No, sir.

Capt. E. S. Johnson, Master of the barge, called by the plaintiff, (On page 52) testified on direct examination as follows:

Q. Now, on the opposite side from where he was climbing, was there, or not, enough room for him to have climbed up in safety?

A. On the opposite side, if he had climbed up on the side, climbed up on there, there would be plenty of room.

Q. If he had climbed up on the left side?

A. On the West side.

Q. That is the left side as we are speaking of it here?

A. Yes, sir.

Q. And there was plenty of room over that side?

A. Yes, sir.

On page 55 of the Printed Record, this witness describes the location of the tracks and the danger which would result from attempting to climb up the side of the car next to the center of the barge.

Again on page 57, this witness further explains the construction of the barge and the necessity for its being constructed as it was at the time of the accident.

Witness F. E. White, conductor, called by the plaintiff, whose testimony begins on page 59 of the Printed Record, testified as follows:

Q. Did you give him any instructions as to

what dangers would arise from the service to be performed by him?

A. Well, no, I did not exactly on account of he had been working the day before. I generally give the instructions the first day.

Q. So you did not give him any?

A. Only the working of the barge, after I started to work the barge I gave instructions from the barge.

Q. Instruct what to do, not what dangers to avoid, but what to do as a brakeman?

A. Yes, sir.

Q. You did not on that occasion, in running the barge, give him any kind of instructions as to what the dangers were, but told him what you wanted done?

A. I told him what I wanted done.

Q. So then, I understand you to say you did not give him any warning as to the dangers he might encounter in performing the duties which you called on him to perform as brakeman?

A. Yes, sir.

On cross examination, page 60:

Q. What was the first thing you did in loading a barge after he came down? Was this the first barge you and he had worked together?

A. Yes, sir, the first.

Q. Was it the first work you did on this barge?

A. Yes, sir.

Q. You unloaded it first?

A. Yes, sir.

Q. How many cars?

A. 28.

Q. You pulled those off?

A. One side off.

Q. Which side did you pull first?

A. The East side.

Q. Then what did you have to do? Load the East side before you pulled for the West?

A. Yes, sir, loaded the East side before pulling the West.

Q. Did he work on that work?

A. Oh, yes.

Q. Now, how—what did he have to do?

A. He had to stay up on top and pass the signals for the head men. * * * *

Q. Wasn't it his duty to fix the brakes on those six cars?

A. Only to put the brake on the leading car, and make his way back to the sixth car.

Q. He remained on the leading car until you shoved the six cars back?

A. Until the first car got to him, and he stepped across on the leading car of the center track.

Q. Please state to the jury whether or not that is the usual and proper mode for getting from the cars on the outside back to the cars on the middle track for the purpose of placing the cars on the middle track.

A. That is the general rule.

By Mr. Buford (counsel for plaintiff):

Q. What rule?

A. Not any written rule, but the rule in the service. Our instructions when we go to work a barge, we remain on top. We don't have any occasion to get down, but we step from one on to the other.

Q. Did you tell Mr. Baugham that?

A. Yes, sir.

Q. You showed him how?

A. I showed him how to step across. I followed him back with the leading car, and told him to always come on the head car, and step on the other car coming in.

Q. Was there any reason for him to get down

on the deck of the barge at all?

A. Not at all.

Q. Stepping from one to the other, was that a reasonably safe way to do it?

A. Perfectly safe.

Q. You so instructed him?

A. Yes.

Q. Did he have anything to cause him to get down on the deck of the barge?

A. No, sir.

Q. Did he have to count the cars off?

A. No, sir.

Q. His sole duty was looking after the brakes on the car?

A. Yes, sir.

Q. You told him that?

A. Yes, sir.

Again on page 63, near bottom.

Q. Was there any reason for Mr. Baugham to get down from the standing car, and cross the left-hand middle track and go up on the inside to the moving car?

A. No, sir.

Q. Did his duty require him to do that?

A. No, sir.

Q. Was the distance between those cars after they passed the flag staff so close as to suggest danger to any one who attempted to get up?

A. Yes, sir.

On re-direct examination by counsel for plaintiff (p. 64):

Q. Do you definitely recall now having warned or having told Baugham to walk from one car to the other without coming to the ground?

A. Yes, sir, I told him when he was on top to step from one car to the other and not to get down, that there was no necessity for him to do it, but to stay on top to pass signals.

Q. You told him that it was necessary for him to stay on top to pass signals?

A. Yes, sir.

Q. Is not that about all you did tell him?

A. I told him how to get around on the barge, the places to be to pass signals, and also rode with him back on the center tracks and instructed about the distance each end of the barge to give the signals, and such as that. The conductor never rides the rear of the train back, only with a new man, and I went back with him on the center track.

Again, on cross examination (page 67), the witness said:

Q. When you were about to have the cars shoved on the center track, on the left-hand side, the brakeman who was killed was standing at that time on the end car, on the side track, which was stationary?

A. Yes, sir, when I pulled off to the side.

Q. You expected him to step from that car to the moving car as it passed him?

A. Yes, sir.

Again, on page 68, the witness was asked by Mr. Buford:

Q. You were asked if Mr. Baugham's duty required him to get upon the car; what was your answer to that?

A. It was not his duty to get upon the car where he got up at. His duty was to stay on top. He got on top right out in the yard and did not have no occasion to get down after he got on top on the yard, and he started towards the barge.

Q. Is not it a fact that his duty required him to be on top of the car; to be on top of the car, which he was climbing at the time of the accident?

A. It was his duty to be on top, but it was not necessary for him to get down and cross the

track. He could merely have stepped across. He was instructed that way, to stay on top and step across.

Again, on page 69, while being examined by Mr. Buford:

Q. Now, you say, Mr. White, that that was the rule. Will you tell us who made that rule?

A. It was the rule of the yard.

Q. Who made it?

A. The company, I suppose.

Q. Have you got any rule book?

A. Have I?

Q. Yes.

A. I haven't any rule book.

Q. Have you got any rule book that says that a brakeman must step across the space between the one track and the other?

A. That is our instruction we give the men down there to do the work. It is not in the rule book. We haven't got—in other words, it is not in the rule book, but it is the way we instruct our men to do the work.

Q. That is to say, it is the way you conductors tell the men how to do?

A. We instruct our men not to get down on the ground, but to stay on top.

Q. To stay on top because they have to give the signal?

A. Give the signal, yes, sir.

On page 79 the witness testifies as follows:

Q. Did you have any conversation with him as to his duty and as to the requirements of the work of brakeman?

A. I did.

Q. Did you go into it fully with him?

A. Yes, sir.

Q. How many barges did you load and unload during the first day that he worked with you?

A. 4.

Q. You unloaded 50, as a matter of fact, but he only worked on 4?

A. On 4.

Q. Did he work on No. 14 the day before he was killed?

A. Yes, sir.

Q. How many times did he work on that?

A. Once.

Q. He loaded and unloaded that once?

A. Yes, sir, all on the last track.

Q. Which of the barges did he load?

A. Barges 2, 4 and 16.

Q. Are those barges like No. 14 so far as the arrangement of the track is concerned, and the house?

A. Exactly the same.

Q. Exactly the same?

A. Yes, sir.

Q. Now, you say you instructed him as to the dangers of the position, and as to his duty?

A. Yes, sir.

Q. Had you known him any length of time?

A. I had been knowing him 3 or 4 years.

Q. You were friends, were you not?

A. Yes, sir.

Q. Was he a man of average intelligence so far as you have observed?

A. So far as I know he was above the average, apparently.

Q. Was anything said to him or done by him to suggest he did not appreciate the dangers or risk of the position that he held?

A. No, sir.

Q. Was anything suggested to you you should tell him further that you failed to do?

A. No, sir.

On cross examination (p. 81):

Q. You were asked if you gave the young man instructions; what did you tell him?

A. I told him most everything I could tell him, in fact, I took him and showed him, and went with him and showed him.

Q. Showed him what?

A. How the work was done, and the danger attached to it.

Q. What dangers are you talking about?

A. Well, principally getting on and off the cars while in motion on the barge, and in the pilot house.

Q. What did you tell him about getting off and on?

A. I told him not to do it under no circumstances, except on the leading car on the end ladder.

Q. Except the leading car on the end ladder?

A. Yes, sir.

Q. What else did you tell him?

A. I told him everything I could tell him.

* * * * * *

Q. If you know now you told him all you could tell him, you ought to know the substance of what you told him.

A. I went right along with him, and I told him the different phases of the work as we went along, and I went right with him, to show him what to do, and how to do it, and how to take care of himself, and how to conduct himself.

Q. How did you tell him how to take care of himself?

A. I told him to stop, look and listen.

Q. Stop, look and listen?

A. Yes, sir.

Q. What were the instructions you gave him with reference to taking care of himself?

A. I told him to take care of himself and look what he was doing.

Q. Recall some of the words you told him.

A. I cannot do that now.

Q. You cannot?

A. No, sir.

Q. Are those all the words you recall having said to this young man?

A. Except what would come up in the conversation while we were showing him.

Q. While actually doing the work?

A. Yes, sir.

Again, on page 87, the same witness testifying:

Q. Where were you when you gave him the instructions?

A. I gave him instructions wherever we should happen to be, wherever we were doing the work, I instructed him as far as that goes.

Q. Wherever you happen to be, with the different work, whatever you happened to be doing, you would give the instruction there?

A. Yes, sir.

Q. And your instruction extended to the things you were doing as you were doing those things?

A. Yes, sir.

Q. How much of the day were you working with Mr. Baugham on the barge?

A. Long enough to work four barges.

Q. How much time did that take?

A. Ordinarily about four hours.

Again, on pages 88 and 89:

Q. You spoke of telling Mr. Baugham that when he got on the car to get up on the end ladder; that was perfectly safe, wasn't it?

A. Yes, sir, on the North ladder on the leading car was perfectly safe place.

Q. Opposite, on the side next to the center of

the barge, was that a safe place?

A. No, sir.

Q. Did you tell him so?

A. Yes, sir, I did.

Q. You said in your direct examination, and also in answer to Mr. Buford, that you showed him as the work progressed?

A. Yes, sir.

Q. You have been a conductor for five years?

A. No, sir, but I have been with the company five years. I was extra conductor about three years and a half.

Q. You have been working as a conductor three and a half years?

A. Yes, sir.

Q. During that time you have had experience in instructing green brakemen?

A. Yes, sir.

Q. What does your experience teach you, as to whether it is best to tell him verbally, or go with him and show him as the work progresses?

A. That is best, yes, sir; show him.

Q. Did you do that with Mr. Baugham?

A. Yes, sir.

Q. Did you show him as the cars were shoved on the barge how to go about the work?

A. Yes, sir.

We earnestly submit that the testimony which we have quoted at length shows that the defendant performed its full duty to the deceased and disposes of the contention of plaintiff in error. We submit with due deference to the opinion of counsel for the plaintiff that it was more intelligent instruction for Baugham to have been shown by Boyland how to do the work than if he had attempted to instruct him verbally without an actual explanation. Experience is the best teacher.

On page 14 of brief, counsel criticise Boylan's demeanor. Fortunately for us the trial court saw him and was the best judge of his bearing, it sustained the demurrer. Again, the Virginia Court of Appeals read his evidence

and affirmed the lower court. We must assume this Court had not lost sight of what it had decided in Aragon Coffee Co. v. Rogers, 105 Va., 51, and could see no resemblance between the cases. It is true that counsel attempted to get into the record some statement claimed to have been made by the witness Boylan to the brother of the deceased (See page 105 of the Printed Record). It will be noticed that counsel for the plaintiff asked the brother of the deceased this question:

> Q. What statement did he make to you?
>
> A. He told me that he was the first man my brother worked under and that he instructed him as to the danger so far as he could under the circumstances. He said that he could not give him full instructions and handle the rest of the business or attend to his work. That is about the statement he made to me in that regard. He further said that he thought if my brother could have been with him the next day—

Objection was made to this question and answer, which was sustained by the court.

The quotation to which we have referred is also cited at the bottom of page 4 of plaintiff's brief. Nothing is said, however, about the fact that the evidence quoted had been excluded on motion of the defendant. This was done (See P. R., p. 105). Counsel at least should have deferred relying on this quotation until the Court had had an opportunity to pass upon the ruling of the trial court in excluding the evidence; at least counsel should have called the Court's attention to the fact that this evidence was only evidence in the event that this Court should sustain their contention that the lower court erred in excluding the evidence.

The seventh sub-division of plaintiff is argumentative, to say the least. We cannot conceive of any action brought for personal injury in which the plaintiff could not with equal force claim the benefit of this, or similiar, argument, and if the argument is sound in every case the plaintiff should recover, because a similiar presumption would exist in each case.

2.

DOES THE EVIDENCE SUSTAIN THE CHARGE THAT THE CONVERGENCE OF THE CENTRAL TRACKS ON THE BARGE WAS A DEFECT OR INSUFFICIENCY DUE TO THE NEGLIGENCE OF THE DEFENDANT IN ITS TRACKS, ROADBED, BARGE OR EQUIPMENT.

The evidence fails to show any such defect or insufficiency, in fact, on the contrary, it shows that the barge, its equipment and the manner of the arrangement of the tracks upon it were such as had been by experience shown to be best suited for the service, so serviceable and suitable, in fact, that it had been followed by other companies similarly situated in the construction and equipment of barges to be used in the same service.

Railroad companies cannot so arrange their tracks as to avoid every element of danger. They can only arrange them so as to be reasonably safe for their employees, themselves in the exercise of ordinary and reasonable care. There could be no arrangement of the tracks on the deck of the barge which did not carry with it some elements of danger to employees not themselves in the exercise of ordinary care. In the instant case, if the barge had been widened it would not have removed every element of danger unless the employees had themselves exercised ordinary care. To have widened this barge after experience of many years had shown the arrangement to be reasonably safe and convenient, would have been unnecessary. It would have involved the re-arrangement of all the barges in the service of the company; it would have involved the re-arrangement of all of the docks in which the barges land; it would have involved a great deal of expense, without any corresponding benefit, unless after all the employees of the company themselves exercised ordinary care.

In Tuttle v. Detroit, etc., 122 U. S., 189, the leading case in this country on the subject, Mr. Justice Bradley, delivering the opinion of the Court, said:

"We have carefully read the evidence pre-

> sented by the bill of exception and although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards where the safety of passengers and the public is not involved, much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question."

It appears to us that the reason would apply with equal force to the question of how barges should be built, how their decks arranged, and how the tracks arranged upon them. To turn this question over to the varying and uncertain opinion of juries would be to leave the subject in chaos.

In Potomac F. P. R. Co. v. Chichester, 111, Va., 152, the Virginia Court quoted approvingly and followed the doctrine announced in the last case.

Further on in its opinion the Court uses this language:

> "We are of opinion therefore, under the facts of this case, that the Court erred in submitting to the jury the question whether or not the defendant company was negligent in the method it had adopted for constructing the switch upon which the injury occurred. * * * We are of opinion also that the Court errer in submitting to the jury the question whether or not the defendant was negligent in the method of handling cars on the switch, that method was proved to be reasonably safe and had been used for many years without personal injury to anyone, and was in common use."

An examination of the testimony of the witness Richardson, set out at length in the record (R. p. 93), proved beyond any question that the arrangement of the tracks upon the barge of the company had been proved by years of experience to be reasonably safe, and had been used for

many years without personal injury to anyone, except in one instance in no wise connected with or similar to the case now under consideration, prior to the accident in which Baugham lost his life.

Later on, continuing the Court says:

> "The test of negligence in the employer is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries may necessarily determine the responsibility of individual conduct, but they cannot be allowed to set a standard which shall in effect dictate the customs or control the business of the community."

The same court, in Norfolk and Western Railway Company v. Cromer, 101 Va., 667, had already approved the doctrine announced in Tuttle v. Railway Company, *supra*.

In its opinion the Court said:

> "It is the duty of the master to exercise reasonable care for the safety of his servant, but he is not bound to provide the latest inventions or the most newly discovered appliances; he is not bound to use more than ordinary care, no matter how hazardous the business may be in which the servant is engaged."

Further on the Court says:

> "In order to hold a master liable for injuries sustained by a servant while engaged in his employment the burden rests upon the servant to prove affirmatively the negligence of the master or a state of facts which warrants an inference of negligence, and that such negligence was the proximate cause

> of the injury. To justify a recovery in such a case the evidence must show more than a probability of a negligent act. The existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of juries, based upon no sure grounds of inference."

In Potomac, etc., v. Chichester, *supra*, Judge Whittle refers, among others, to the case of Bethlehem Iron Company v. Weiss, 100 Fed., 45. Circuit Judge Gray, delivering the opinion in this case, quotes approvingly from the opinion delivered by Mr. Justice Bradley in Tuttle v. Railway, *supra*. Further on Judge Gray approves of the charge which was given by the trial judge. In this charge as quoted in the opinion we find the following:

> "I charge you that, while it is the duty of an employer to instruct an inexperienced man whom he takes into his employment respecting dangers and sources of dangers which are not open and obvious, it is not the duty of an employer to warn any man of full age of dangers which are apparent and may be seen and appreciated by himself. Of all such dangers the employee himself takes the risk. He assumes the ordinary hazards of his employment. This is a well settled principle of the law and it is a just and necessary one. An iron mill cannot be made as safe as a church. The nature of the work to be done and the mechanism and appliances which must be operated are of course more or less inherently dangerous. A manufacturing enterprise would scarcely be undertaken by rational men if the law of the land charged them with liability for every mischance that might arise in pursuing them. Nor can an employee support an action against his employer upon the ground that he was not informed of any peculiar danger if, in point of fact, he had in any manner acquired a knowledge and understanding of that danger before being hurt."

In Osborne v. Coal Company, 71 N. W., 814, the Supreme Court of Wisconsin, in passing upon a question similar to the one now under consideration, used this language:

> "The general ground on which a right of recovery is claimed is the failure of the defendant to provide a safe place for the plaintiff's decedent to do his work in. It does not appear how long experience the decedent had had at the employment at which he was engaged, but he was an adult man and must be presumed to have known and appreciated all such risks of the employment as were open and obvious to a man of ordinary apprehension. He is deemed to have assumed the risk of all such dangers of the employment as he knew or could have discovered by the exercise of reasonable attention. Such risks he fails to appreciate at his own peril. As against him the defendant had the right to carry on its business in such a place and manner and with such appliances as best suited its choice or interests, even if some other would have been safer, so that it did not violate the law of the land nor expose him to dangers which he did not know and could not learn by the exercise of reasonable attention. That this was not a safe place to work in was obvious to any man of ordinary apprehension. This the plaintiff's decedent could not fail to appreciate if he gave the situation even the slightest attention. That there was need of constant circumspection in order to avoid obvious dangers is manifest. Cars are coming to be loaded at all times of the night, they come without warning of bell or whistle."

In the case now under consideration the place in which it was the duty of the deceased to perform the work in which he was then engaged was perfectly safe. The place in which it was not his duty to perform it was unsafe and dangerous, so unsafe and so dangerous that any adult of ordinary intelligence could not have failed to observe it.

What was the explanation given by the deceased? The last thing he said was in reply to a question from the witness Hubbard: (P. R. 90.)

> Q. Tommy, how in the world did this happen?
>
> A. I went around the car and went to crawl up on the side of the car and got jammed with the car on the side of the track.
>
> Q. What in the world were you thinking about, Tommy?
>
> A. *I was not looking.* (Italics ours.)

In this last utterance of the dying man the whole story was told. He did not say that they had not warned him of the dangerous place in which he had to work. He did not say that he was forced to work where it was dangerous without proper instruction. He said simply and truthfully "I was not looking." If he had looked he would never have attempted to climb up the side of the moving car and he would not have received the injury which caused his death.

Central Vermont R. R. Co. v. Bethune, 206 Fed. 868:

> The facts in this case are such as to make it very much like the one under consideration.
>
> The Employer's Liability Act was under consideration as in the instant case.
>
> In the opinion Judge Putnam quotes approvingly the Tuttle case and follows it.

To attempt to quote from this opinion would be unfair to this court. It should be read in full.

See also Kempton v. Boston Elevated Railway Co., 104 N. E. p. 358 and cases there cited, and Haring v. Great N. R. R. Co. 119 N. W. 325.

It may not be inappropriate at this point to refer to

the contention of the plaintiff in the record to the effect that the trial court erred in admitting the evidence of witness Edward Richardson (See Bills of Exception Nos. 1 and 2). Upon the question of the proper equipment of the barge and arrangement of its tracks, evidence of what was done by other companies was the very best evidence as to what should be considered safe and reasonable. This is what the trial court held and in so doing it committed no error.

3.

DID THE DECEDENT ASSUME THE RISK OF THE DANGER WHICH RESULTED IN HIS INJURY AND DEATH?

This necessarily involves the construction of section 4 of the Federal Employer's Liability Act.

At the trial, and in his petition praying for a writ of error, the plaintiff relied upon *his* construction of section 4 of the act (See Printed Record, page 112). He claims that the common law doctrine of the assumption of the risk, having been repealed by the Virginia constitution, cannot be revived by the Act of Congress and cannot be availed of as a defence in this case, because the common law does not exist in Virginia as a part of the Federal jurisdiction. He also contended that section 4 of the Act in question does not give the common carriers engaged in inter-state commerce the benefit of the common law doctrine of assumption of risk, even as modified therein.

If these questions were open ones in this court, which we contend, and will undertake to show, they are not, they are to our mind settled certainly in Virginia by the decision of her own Court of Appeals. We refer to the case of Southern R. Co. v. Jacobs, 116 Va., 189. In this case the plaintiff was represented by the same able counsel as appear in the one now under consideration, and they there asserted the same propositions as announced above.

Judge Keith, the learned President of the Court, de-

livered the opinion, and he discusses the question involved, with his usual clearness and force, and if it were permitted we could well afford to adopt it as our brief in the present case.

President Keith, after quoting the Act of Congress, says:

> "To the act, then, we must look for the law governing the liability of railroads and their employees *inter sese*, and in order to determine their relative privileges, duties and obligations. It in itself and of itself constitutes the sole and supreme law as to the subjects upon which it touches, and is not to be pieced out by reference to State legislation."

This would seem to dispose of plaintiff's contention that the fourth section of the Act will be construed differently in Virginia than in other states, or that its construction can in any wise be affected by the Virginia constitution. Congress has the exclusive right to legislate upon the responsibilities of carriers, engaged in commerce between the states, to their employees. When it has spoken on the subject the law passed by it becomes at once the law controlling the subject matter, the only and exclusive law on the subject.

Mondou v. N. Y., N. H. & H. R. R. Co., 223 U. S., 1.

Mich. Cent. R. R. v. Vreeland, 227 U. S., 59.

It being granted that we must look to the Act of Congress for the law, let us see what has been the construction placed upon it by the courts which have had it under review?

In Southern Ry. v. Jacobs, supra, Judge Keith passes upon this question as follows:

> "Instruction No. 2 deals with two propositions: First, the doctrine of assumed risk; and, secondly, with that of contributory negligence. With respect to the latter subject, the instruction seems to be in accordance with section 3 of the Employer's Lia-

bility Act, which declares, that although the employee may have been guilty of contributory negligence that fact shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"The objection urged to the instruction is to the first clause of it which tells the jury that knowledge by the plaintiff of the unsafe character or condition of the roadway is of itself no defense to an action for injury caused thereby.

"Under the Virginia law the instruction in this respect would be free from objection, for our Constitution, adopted in 1902, declares that 'Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defense to an action for injury caused thereby,' which wholly destroys the defense of assumed risk as applied to railroad employees. The language of the act of Congress is far otherwise. Section 4 declares that 'in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'

"The contention of the defendant in error is that the risks assumed in contemplation of this act are such as are inherent in the work in which the employee is engaged, and such as cannot be foreseen and prevented by the exercise of ordinary care upon the part of the employee; that it was not intended to embrace such risks as flow from any negligent act on the part of the employer, or of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence,

in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment, but that as to such acts of negligence the employer is under an absolute liability by force of the first section of the act, and in support of this contention relies in part upon the precise form of the term used in the act, which does not speak of 'assumption of risks,' but uses the phrase, the employee shall not be held to have 'assumed the risks.' But this change merely in the order of the words used cannot have any important bearing, we think, on the construction of the statute; 'Assumption of risks,' and 'assumed risks' of his employment being equivalent modes of stating an identical proposition. It is a phrase which has acquired a definite technical meaning, nowhere more vigorously enforced than in the decisions of the Supreme Court of the United States.

"In Texas Pacific R. Co. v. Archibald, 170 U. S., 665, 18 Sup. Ct., 777, 42 L. Ed., 1188, the Supreme Court said: 'The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being performed, and that whilst, in entering the employment, he assumes the ordinary risks incident to the business he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employee receive for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used.'

"In Words and Phrases, under the title 'Assumption of Risk' many authorities are collated, all of which confirm the doctrine as stated in the case

just cited. It is a doctrine wholly distinguishable from that of contributory negligence, which is a breach of legal duty imposed by law upon the servant, however unwilling or protesting he may be, and difers from the assumption of risk which is not a duty but merely voluntary upon the part of the servant. Dempsey v. Sawyer, 95 Maine, 295, 49 Atl. 1035.

"In Schlemmer v. Buffalo, R. & P. Ry. Co., 205 U. S., 1, 27 Sup. Ct., 407, 51 L. Ed., 681, dealing with the subject of assumption of risk, it is said: 'Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present case * * * But, at the present time, the notion is not confined to risks of such negligence. (That is to say, negligence necessarily incident to the employment.) It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises, and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law.'"

"Cases might be multiplied to any extent to show that the doctrine of assumed risks covers more than these risks which are ordinarily incident to the business, and embraces the use of defective appliances, and work of almost every description where the employee with knowledge of the defect contiues to use it without notice to the employer.

"Upon this point see Choctaw & Gulf Ry. Co. v. McDade, 191 U. S., 64, 24 Sup. Ct., 24, 48 L. Ed., 96, where it is said that 'An employee assumes the risk of injury only when the defect is known to, or plainly observable by, the employee.'

> "When in section 3 Congress deals with contributory negligence, it forbids that defense wholly in cases where the common carrier has violated a statute enacted for the safety of its employees and such violation contributed to the injury or death of the employee. The same idea runs through section 4, and the doctrine of assumed risks is wholly excluded where the danger arose from the violation by the common carrier of a statute enacted for the safety of the employee. The language employed is plain and easy to be understood, and leaves, we think, except in the particular mentioned, the defense of assumption of risks in full force and vigor. The subject has been considered in numerous cases."

Judge Keith refers to and quotes from the following cases:

Freeman v. Powell, (Tex. Civ. App.), 144 S. W. 1033.

Bowers v. Southern Ry. Co., 73, S. E., 677.

Barker v. Kansas City M. & O. Ry. Co., 129 Pac., 1151, 43 L. R. A., n. s., 1121.

Central Vermont Ry. Co. v. Bethune, 206 Fed., 868.

Gulf, Colorado, &c Ry. Co. v. McGinnis, 228 U. S., 173.

Mondou v. N. Y., N. H. & H. R. Co., 223 U. S., 1.

Seaboard Air Line Railway Co. v. Moore, 228 U. S., 433.

To the cases cited above we will add the following:

Texas and Pacific Ry. Co. v. Harvey, 228 U. S., 319.

Norfolk & Western Ry. Co. v. Earnest, 229 U. S., 114.

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492.

Southern Ry. Co. v. Crockett, 233 U. S., 897.

The two cases last above cited were not referred to in the opinion of Judge Keith, doubtless because they had not then been decided.

Norfolk & Western Railway Company v. Earnest, *supra*, was tried in the District Court of the United States for the Western District of Virginia. In the petition for the appeal complaint was made of the refusal to give instruction requested by the defendant in the court below upon the subject of the assumption of risk. In passing upon this question this Court said:

> "But the instruction was couched in such general and sweeping terms that is was not calculated to give the jury an accurate understanding of the law upon that subject or to direct their attention to the particular phase of the case to which it was deemed applicable, consequently the refusal to give it was not error."

It occurred neither to the trial court nor to this court, to say that the instruction should not have been given because the constitution of the State of Virginia had abolished the doctrine of assumption of risk and that it was no longer available as a defense in an action brought to recover damages under the Employer's Liability Act.

Seaboard Air Line Railway Company v. Horton, *supra*, is particularly in point. It was a suit brought under the Employer's Liability Act. This court, from the language used in its opinion, was convinced that the trial court in its instructions held that the questions of the employer's duty and the assumption of risk by the employee were to be controlled by the North Carolina statute, rather than the Act of Congress, and after discussing this phase of the question, said:

> "By the phrase 'any statute enacted for the safety of employees', Congress evidently intended Federal statutes, such as the safety appliance acts * * *). For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the

several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer.

"It seems to us that Section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking Sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible.

"* * * On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman,—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may rise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe

appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. * * *

"When the employee does know of the defect and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty."

From the foregoing decision we may gather: First, that to the Employer's Liability Act, and not to the statutes of the various states, we must look for the rules to govern the courts in construing the act and enforcing it; and Second, that under Section 4 of the act the defense of assumption of risk shall have its former effect as a complete bar to the action, except in those cases in which it is expressly eliminated by the terms of the act.

If the statutes enacted by the various states cannot control, no more can the constitutions of the states control, and even though the constitution of the State of Virginia did abolish the assumption of risk as a defense, it should have no effect upon the courts to construe and enforce the employer's liability act, and the contention of the plaintiff in this case that it has any such force or effect must necessarily fail.

This case was again before this court on appeal 6 Sup. Ct. Rep. p. 180, and this court adhered to its first decision on the question of assumption of risk.

In Southern Railway Company v. Crocket, supra, we quote from the opinion as follows:

"The contentions of defendant, overruled by

each of the state courts and here renewed, are, that the true interpretation of the employer's liability act, the common-law rule respecting the assumption of risk was not abolished except in cases where the violation by the carrier of some statute enacted for the safety of employees contributed to the injury of the employee; and that by the safety appliance act and amendments, as properly interpreted, the height or construction of the draw-bars of locomotives was not regulated, so that the fact that the drawbar in question was only 30 inches high was not a violation of these acts, and hence afforded no ground for a recovery under the employer's liability act. * * *"

"Upon the merits, we of course sustain the contention that by the employer's liability act the defense of assumption of risk remains as at common law, saving in the cases mentioned in Section 4, that is to say: 'Any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.' "

In Mondou v. N. Y., N. H. & H. R. R. Co., supra, Mr. Justice Van Devanter, in delivering the opinion, says:

"Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: * * * (c) The rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; * * * "

"Of the objection to these changes it is enough to observe:

> "First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' "

Kempton v. Boston Elevated Ry. Co., 104 N. E., 358, decided by the Supreme Judicial Court of Massachusetts, February 27, 1914. In this case the question of the assumption of risk and the master's duty to warn are both considered, and it may be cited with particular appropriateness to the present case. After assuming certain questions in favor of the plaintiff's contention, the Court, in announcing its opinion, proceeds to say:

> "2. It was by reason of the permanent construction of the defendant's car barn that the injury occurred. The post in question was so near to the track that anyone who attempted to get on or off the platform of a car at that time was in danger, especially if the car moved, or just such an accident as happened. Under such circumstances, if the situation was not plain and open, and so far as the danger arising therefrom was not obvious, or was not fully known to its employees, it was the duty of the defendant to warn them, and to instruct them not to enter or leave the platform by the side of the post when the car was in motion or might at once be put in motion. For a breach of this duty an action could be maintained against the defendant in behalf of anyone injured by reason thereof, if the other requisites to the maintenance of an action were found to exist. (Authorities omitted.)

'3. But if the defendant discharged this duty, or if the mode of construction and the risk arising therefrom were fully known to its employees, or if they had in fact assumed that risk, the defendant owed them no duty to change the mode of construction or to abandon the use of the wider cars. (Authorities omitted.) Most of these cases were decided on the ground of assumption of risk, but they fully support the proposition that has been stated.

"4. But in this case there was no occasion for the defendant to warn the plaintiff's intestate. The position of the post was perfectly plain and had remained unchanged for years. Its proximity to the railroad track and to the cars standing or moving thereon was obvious. It was manifest that there was not room for a man to move freely between the post and a car platform. The danger of attempting to leave or to enter a car platform opposite to the post and on that side of the car was perfectly plain. The character of the risk was in no wise altered though the available space was somewhat narrowed, by the introduction of the wider semi-convertible cars. (Authorities omitted). The intestate had been running cars in and out of the barn for many years, and was perfectly familiar with the location of the posts and the tracks. The defendant could have told him nothing, by way of either warning or instruction, that was not already known to him. But the duty of an employer to give warning or instructions 'exists only when there are dangers in the employment of which' the employer 'has or ought to have knowledge, and which he has reason to believe his employee does not know and will not discover in time to protect himself from injury.' (Authorities omitted.)

"As has been stated, the defendant owed to the intestate no duty to change its construction, the location of its post, or the width of its cars. (Authorities omitted.) The only duty that could rest upon the defendant was to give proper warning of the

danger; and under the circumstances disclosed there was no occasion for that."

Chicago, Burlington and Quincy R. Co. v. Shalstrom, 195 Fed., 725. In deciding this case Circuit Judge Sanborn, who delivered the opinion, used language peculiarly appropriate to the case now under consideration. He says:

"Conceding, without considering or deciding the question, that there was evidence that the Railway Company failed to discharge its duty to exercise ordinary care to furnish a reasonably safe place for the plaintiff to make and place the joists, this case must be determined by the following established rules of law:

"1. A servant by entering and continuing in the employment of a master without complaint assumes the ordinary risks and dangers of the employment and the extraordinary risks and dangers thereof which he knows and appreciates. (Authorities omitted.)

"2. Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience' (United States Smelting Company v. Parry, 166, Fed., 407, 410, 92 C. C. A., 159, 162), and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes. (Authorities omitted).

"3. When a defect is obvious or 'so patent as to be readily observed by a servant by the reasonable use of his senses, having in view his age, intelligence and experience,' and the danger and risk from it are apparent, he cannot be heard to say that he

did not realize or appreciate them. (Authorities omitted.)

"4. No duty rests on the master to warn a servant of defects, risks, or dangers that are 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence and experience.' (Authorities omitted.)

"5. Assumption of risk rests upon the maxim, 'Volenti non fit injuria,' and upon the contract of employment. It rests upon the principle that no legal injury can be inflicted upon one who willingly assumes the known or obvious risk of it, and hence it includes the risk of known or obvious defects and dangers which the master or the foreman directs the servant to incur during the employment, for the latter is as free to decline to obey such an order as he is to decline to take or to continue in the employment, and where he knows and apprciates the defect and danger as well as the master or the foreman, he becomes subject to the maxim, upon the willing no legal injury can be inflicted. The order or direction of the master, or of the foreman, to the servant to work at a specified place, or with certain appliances, does not release the servant from his assumption of the apparent risks and dangers of defects in the place, structure, or appliances that are known to him, or are 'so patent as to be readily observed by the reasonable use of his senses, having in view his age, intelligence, and experience.' (Authorities omitted.)

"6. The agreement of the servant to assume the ordinary risks of his employment and the extraordinary risks thereof that are known to and appreciated by him inheres in and is an inextricable part of his contract of employment, and when it is proved or admitted the assumption of these risks is proved, and no further pleading or proof on the part of the defendant is necessary to establish it. (Authorities omitted.)

"7. When the uncontradicted evidence discloses

> the fact that the defects in the place, structure, or appliances were 'so patent as to be readily observed by the plaintiff by the reasonable use of his senses, having in view his age, intelligence, and experience,' and the risks and dangers from them were apparent, and he entered upon or continued in the service without complaint, his assumption of the risk is conclusively established, and the court should instruct the jury to return a verdict for the defendant. (Authorities omitted.)"

Hollingshead v. Detroit, etc., 148 N. W., 171, *supra*, is a case strongly in point with the case now under consideration. This case was decided by the Supreme Court of Michigan on July 24, 1914. We quote from the language of Judge Brooke as follows:

> "The liability of a common carrier railroad under either the Federal or State act to its employes in case of injury must be based upon some negligent act of the railroad. We are of opinion that the failure of the defendant to notify plaintiff of the danger in riding the tender into the roundhouse in the position assumed by him at the time of his injury was not negligence. The danger of assuming such a position upon any of the engines was an obvious one. Plaintiff claims to have ridden through one or the other of these various doors at least a hundred and fifty times. The clearance betwen the smallest tender and the door jamb was but sixteen inches, a space so small as to render it exceedingly hazardous for an employee to assume a position on the outside of the tender. The point selected by the plaintiff upon which to ride into the roundhouse was not the only place upon the engine he might have boarded. He might too have stopped the engine just outside the door and walked in in front of it or followed it in. During the period of plaintiff's employment engines of the type upon which he was injured were frequently in the terminal. The size of the tenders upon

> these engines was open to his observation, and it was his duty, knowing the width of the door in question, to have taken some care for his own safety. The roundhouse was a permanent structure. The engines to be placed therein went at a very low rate of speed, not faster than a man would ordinarily walk. * * * We must hold that under our own decisions it was the duty of the plaintiff to have familiarized himself with the situation and the obvious danger of following the course which led to his injury, and that it was not negligence of the defendant to fail to warn him."

See also cases quoted in support of the foregoing opinion.

In White v. Owosso Sugar Company, 112 N. W., 1125, the Court, in discussing the question of the necessity of warning an employee as to a risk which was obvious, uses this language:

> "This in itself was nothing more than common labor and ordinarily would call for no superior intelligence. It would be a very low degree of intellect that would not understand the danger that would follow the contact of the iron plate with the descending buckets which were in motion when the plate was lifted, and the danger to be apprehended from such contact was so apparent to anyone that we think it was not negligence in the master to omit calling special attention to it. We have often said that it is not negligence to omit warning against an obvious danger."

See also Haring v. Great N. R. R., 119 N. W. 325, from which we have already quoted in this brief.

Counsel for the petitioner, in his petition (Printed Record, page 112), says:

> "That the common law defense is not available

> because the common law does not exist in Virginia as a part of the Federal jurisprudence, but only by virtue of its statutory adoption by the State, and to the extent that it has not been repealed."

In the case now under consideration the trial court and the Supreme Court of Appeals has held that the act of Congress familiarly referred to as the Federal Employer's Liability Act is the only law regulating the liability of employer to employee engaged in inter-state commerce; and that the same is to be interpreted and enforced as the law of the land, uncontrolled and unaffected by state constitutions and state statutes. And while upon its refusal to grant the writ of error in this case it was unnecessary for the latter court to express any opinion, it may be fair to assume that its opinion in Southern Railway v. Jacobs contains the reasons for its refusal to grant the writ of error in this case.

CONTRIBUTORY NEGLIGENCE.

The demurrer to the evidence should have been sustained upon the grounds that the evidence clearly showed that Baugham was guilty of negligence which was the proximate cause of his injury. There was a place perfectly safe in which his duties were to be performed, he elected to leave this and attempt to perform them where it was not only dangerous, but so very dangerous that the danger must have been open and obvious to one of his age, experience and intelligence.

Smoot v. Johnson, 114 Va. 454.
Street v. N. & W. Ry., 101 Va. 751.
Kane v. Northern Central R. R., 128 U. S. 91.
Poirier v. Bartlett Lumber Co., 148 N. W. 750 *supra.*

Other authorities could be cited, but we cannot believe the proposition of law will be disputed.

EXCEPTIONS TO ADMISSION AND EXCLUSION OF EVIDENCE.

Counsel do not refer to these exceptions in their brief. They may mean to abandon them, but they have not done so in words. Bills of Exception Numbers 1 and 2 were taken to the action of the Court in admitting the testimony of the witness Richardson. This evidence was clearly admissible, but if there had been any doubt about it, the argument of counsel in the brief upon the question of defects in the arrangement of the barge shows not only that it was admissible, but relevant.

Bills of Exception Numbers 3, 4 and 5 were taken to the Action of the Court in refusing to allow the witness Harry Boylan to be asked certain questions. An examination of the question asked, and which the Court excluded, will show conclusively that the action of the trial court was correct and the exception not well taken.

CONCLUSION.

We claim that the uncontradicted evidence in this case shows:

1.

That if there was any danger in the place where the decedent Baugham had to work, it was open and obvious, and there was no necessity for him to have been warned against the same.

2.

That if the danger was not open and obvious, the instructions which he received were ample and sufficient for a person of his age, intelligence and experience.

3.

That the convergence of the tracks on the barge was not a defect or insufficiency due to the negligence of the defendant in its roadbed, tracks, appliances and equipment, but, on the contrary, was the reasonable, proper and usual mode of arranging said tracks for the purpose for which they were then being used.

4.

That the decedent Baugham was guilty of contributory negligence in electing to do his work in an unsafe, rather than in a safe place, when both places were open to him.

5.

That the risk of the accident in which the decedent lost his life was one of the risks assumed by him when he entered the employment of the company, and was not due to the violation by the defendant company of any statute enacted for the safety of employees.

The contention of counsel for the plaintiff in error that the doctrine of assumption of risk is no longer available as a defense in an action brought to recover damages under the employer's liability act, is not supported, so far as we know, by any decision of this court, or any other court in which the question has arisen.

And we further claim that his position is equally incorrect when he relies for his authority upon the fact that the doctrine of the assumption of risk in Virginia, so far as the employees engaged in railroad service are concerned, was abolished by the State constitution, rather than by an act of the General Assembly.

Respectfully submitted,

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